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Supp. Ct.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 60

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1945
CERTIORARI GRANTED MAY 28, 1945

No. 10760

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER and RUDOLPH WAGNER,

Appellants,

vs.

LEO T. CROWLEY, as he is ALIEN PROPERTY CUSTODIAN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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337 Tenth Street
Richmond, California

JACKSON MADDUX, ESQ.,

333 Montgomery Street
San Francisco, California

Attorneys for Defendants and Appellants.

HON. FRANK J. HENNESSY,

United States Attorney

W. E. LICKING, ESQ.,

Assistant United States Attorney
Post Office Building
7th and Mission Streets
San Francisco, California

Attorneys for Plaintiff and Appellee.

In the Southern Division of the District Court of the United States for the Northern District of California

Civil Action File No. 22363-G

LEO T. CROWLEY, as he is ALIEN PROPERTY CUSTODIAN,

Plaintiff,

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, RUDOLPH WAGNER, and THE SAN FRANCISCO BANK, as it is EXECUTOR OF THE WILL OF ALVINA WAGNER,

Defendant.

COMPLAINT

1. This action arises under the Act of March 3, 1911; 36 Stat. 1091; U.S. Code, Title 28, Section 41(1) and under the Act of October 6, 1917; 40 Stat. 425; U.S. Code, Title 50, Appendix, section 17; as hereinafter more fully appears.

2. The plaintiff is Alien Property Custodian. [1*]

3. The defendant The San Francisco Bank is a California banking corporation which has its principal place of business in San Francisco, California. It is executor of the will of Alvina Wagner, late of San Francisco, California, who died on or about June 6, 1942. That defendant will hereinafter be

*Page numbering appearing at foot of page of original certified Transcript of Record.

referred to as the "defendant executor". The will was admitted to probate on or about June 26, 1942 by the Superior Court of the State of California in and for the City and County of San Francisco. A copy of the will is attached hereto as Exhibit A.

4. The names and residences of the other defendants are as follows:

Alvina Allen, Oakland, California,
Gertrude Dinwiddie, Tarzana, California,
Hilda Pigozzi, Oakland, California,
Fred Wagner, Oakland, California,
Paul Wagner, Oakland, California, and
Rudolph Wagner, Pope Valley, California.

Those six defendants will hereinafter be referred to as the "individual defendants".

5. The late Alvina Wagner left ten heirs at law surviving her. Six of those heirs at law are the indidual defendants named in paragraph 4. The other four,

Paula Knuppel,
Olga Kruager,
Fritz Wagner, and
Paul Wagner,

are all nationals of and residing in Germany.

6. On or about December 30, 1942 the individual defendants filed in the Superior Court of the State of California in and for the city and county of San Francisco, a petition for determination of heirship. A copy of that petition is attached hereto as Exhibit B. [2] That petition has not been heard, and no determination of heirship has been made.

7. On January 23, 1943, in compliance with law, the plaintiff issued Vesting Order No. 762. A copy thereof is attached hereto as Exhibit C.

8. The Vesting Order was filed with the Division of the Federal Register on January 27, 1943, and was published in 8 Federal Register 1252, all in compliance with law.

9. By virtue of the Vesting Order, the plaintiff became the owner of, and entitled to receive in distribution, the entire net estate of the late Alvina Wagner, after payment of expenses of administration, inheritance and estate taxes if any, and debts of the decedent.

10. By virtue of the Vesting Order, the plaintiff became the owner of and entitled to receive in distribution, subject to payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, the real property now in possession of the San Francisco Bank, as it is executor of the Will of Alvina Wagner, decedent, which real property is more particularly described in paragraphs numbered 1, 2, 3 and 4 of page 2 (page 11 of this complaint) of said Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C", reference to which description is hereby made and made a part hereof as though fully set forth herein; all of said property being situated in the City and County of San Francisco, State of California.

Wherefore, the plaintiff demands that a judgment be entered (1) determining that the individual defendants are entitled to no part of the

estate, (2) determining that the plaintiff is entitled to the entire net estate after payment of expenses of administration, inheritance and estate taxes if any, and debts [3] of the decedent, (3) determining that the plaintiff is the owner of that certain real property which is more particularly described in paragraphs 1, 2, 3 and 4 of page 2 (page 11 of this complaint) of Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C", reference to which description is hereby made and made a part thereof as though fully set forth herein, subject to the payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, and (4) ordering the defendant executor to pay the entire net estate to the plaintiff upon the allowance of its final account as executor.

Signed: FRANK J. HENNESSY,
United States Attorney
Address: 422 Post Office Building,
San Francisco, Calif.

Of counsel
A. MATT WERNER
General Counsel,
Office of Alien Property Custodian. [4]

Signed: GEORGE A. McNULTY,
Chief, Alien Property Unit
War Division, Department of
Justice, Washington, D. C.
Signed: WALLACE H. WALKER,
Attorney, Alien Property Unit
War Division, Department of
Justice, Washington, D. C. [5]

EXHIBIT A

I, Alvina Wagner, a resident of San Francisco, California, do make, publish and declare this to be my last Will and Testament, in the manner following, that is to say:

First: I give, bequeath and devise to my brother, Paul Wagner, my brother, Fritz Wagner, my sister, Olga Kruager and my niece, Paula Knuppel, all of my property, be it real or personal, wheresoever situate, of which I die possessed, and to share equally.

Second: In the event that my said niece, Paula Knuppel, predeceases me, then and in that event the share of my estate so bequeathed and devised to her, I hereby give, bequeath and devise to her son, (whose given name I do not know).

Third: I hereby nominate and appoint The San Francisco Bank, to act as Executor of this my last Will and Testament.

Fourth: I hereby revoke all former Wills by me made.

In Witness Whereof, I have hereunto set my hand and seal this 23rd day of December, 1941.

(Signed) ALVINA WAGNER

Witness:

(Signed) JOSEPH NUHN

Residing at 3054 San Bruno Ave. San Francisco, Calif.

Witness:

(Signed) ALFRED VOYCE

Residing at 1239 Polk Street San Francisco, California.

[6]

"EXHIBIT B"

In the Superior Court of the State of California
In and For the City and County of San Francisco

Probate No. 90121 Dept. Nine

In the Matter of the Estate of

ALVINA WAGNER,

sometimes known as ALVINE WAGNER,
sometimes known as ALWINA WAGNER,
sometimes known as ALWINE WAGNER,
and sometimes known as ALVINA T. WAGNER,
Deceased.

To the Honorable Superior Court Aforesaid:

The petition of Rudolph Wagner, Paul Wagner, Alvina Allen, Fred Wagner, Gertrude Dinwiddie and Hilda Pigozzi respectfully shows:

I.

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner dies testate on the 6th day of June, 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th day of June 1942, the San Francisco Bank was appointed by the aforesaid Superior Court, executor of the estate of said deceased, and that thereafter on said day it qualified as said [7] executor, and that it is now the duly qualified and acting executor of said estate.

II.

That notice to creditors in the manner required by law has been given and the time to file and present claims against the estate has expired, but the estate is not in a condition to be closed.

III.

That your petitioners are nephews and nieces of said decedent and are her heirs; that the other heirs of the said decedent are Paul Wagner, brother; and Fritz Wagner, brother; and Olga Kruager, sister, and Paula Kruppel, niece; that Paul Wagner, Fritz Wagner, Olga Kruager, and Paula Kruppel are citizens and residents of Halle, Germany, and as such not entitled to share in the estate of said decedent; that petitioners are entitled to have the whole of said estate distributed to them.

IV.

That said estate consists of separate property, decedent being a single woman at the time of her death.

V.

That the said property is described in the Inventory and Appraisement on file herein.

VI.

That there are various persons who claim an interest in the estate of the deceased, and that the rights of such persons so claiming an interest in said estate have not been determined by any court of competent jurisdiction.

Wherefore, your petitioners pray that the court determine who are entitled to distribution of the Estate of Alvina Wagner, [8] also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner, deceased.

S. C. MASTERSON
Attorney for Petitioners

State of California
County of Contra Costa—ss.

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in Richmond, Contra Costa County, California, and is the attorney for petitioners in the above-entitled action; that the petitioners are absent from the county wherein the affiant has his office and for that reason the affiant makes this verification on petitioners behalf; that he has read the foregoing Petition and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON

Subscribed and sworn to before me this 30th day of December, 1942.

[Seal] MABEL D. SOUSA
Notary Public in and for the County of Contra Costa, State of California. [9]

"EXHIBIT C"

Office of Alien Property Custodian
Washington
Vesting Order Number 762

In re: Estate of Alvina Wagner, deceased (File D-28-4419; E. T. Sec. 1209)

Under the authority of the Trading with the Enemy Act as amended, Executive Order 9095 as amended, and pursuant to law, the Alien Property Custodian after investigation,

Finding that—

(1) The property and interests described below in subparagraphs (a) and (b) are property which is in the process of administration by The Francisco Bank, Executor, 526 California Street, San Francisco, California, acting under the judicial supervision of the Superior Court of the State of California, in and for the City and County of San Francisco;

(2) Such property and interests are payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely,

Nationals:	Last known address:
Fritz Wagner	Germany
Olga Krauger	Germany
Paula Knuppel	Germany
Paul Wagner	Germany

(3) The property and interests described in subparagraph (b) are property within the United States owned or controlled by the aforesaid nationals of a designated enemy country, Germany; and

Determining that—

(4) If such nationals are persons not within any designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country, Germany; and

Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise, and deeming it necessary in the national interest,

Now, Therefore, the Alien Property Custodian hereby vests the following property and interests:

(a) All right, title, interest, and claim of any kind or character whatsoever of Fritz Wagner, Olga Grauger, Paula Knuppel, and Paul Wagner, and each of them, in and to the estate of Alvina Wagner, deceased; and

(b) All right, title, interest, and estate, both legal and equitable, of Fritz Wagner, Olga Kruager, Paula Knuppel, and Paul Wagner, and each of them, in and to the real property situated in the City and County

of San Francisco, State of California, and described as follows: [10]

(1) Commencing at a point on the southerly line of Geary Boulevard, distant thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a Portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging,

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet; thence at a right angle Northerly one hundred feet to the point of commencement,

Being a part of Outside Land Block No. 882. Together with all improvements and appurtenances thereunto belonging.

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly twenty-five feet; thence at right angles Easterly one hundred and twenty feet to the point of beginning.

Being a portion of Outside Land Block No. 785. Together with all improvements and appurtenances thereunto belonging,

to be held used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and interests and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property and interests or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if any when it should be determined that such return should be made or such compensa- [11] tion should be paid.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Dated: January 23, 1943
(Signed) LEO T. CROWLEY
Leo T. Crowley
Alien Property Custodian

[Official Seal]

Certified to be a true copy of the original
(Signed) FRANCIS A. MAHONY
Francis A. Mahony, Secretary
Office of Alien Property
Custodian

[Endorsed]: Filed April 6, 1943. [12]

[Title of District Court and Cause.]

MOTION TO STRIKE

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, and move the Court for an Order to strike the complaint on file herein [13] on the following ground:

That this Court has no jurisdiction over the subject matter in this action.

S. C. MASTERSON
Attorney for Said Defendants.
337 Tenth Street
Richmond, California
Richmond 4161

Copies mailed this date to:
(1) The San Francisco Bank
526 California Street
San Francisco, California

(2) Frank J. Hennessy
United States Attorney
422 Post Office Building
San Francisco, California

(3) A. Matt Werner
General Counsel
Office of Alien Property Custodian
Washington, D. C.

(4) George A. McNulty
Chief, Alien Property Unit
War Division, Department of Justice
Washington, D. C.

(5) Wallace H. Walker
Attorney, Alien Property Unit
War Division, Department of Justice
Washington, D. C.

Dated: May 25, 1943.

S. C. MASTERSON

[Endorsed]: Filed May 25, 1943. [14]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE SAN FRANCISCO BANK

The San Francisco Bank, one of the defendants in this action, answers the complaint as follows:

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the complaint.

2. Answering the allegations of paragraphs 9 and 10 of the complaint, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth thereof.

This defendant alleges further that the other defendants claim and assert that they are the owners of and entitled to distribution of the net estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, to the exclusion of plaintiff; that the claims of those defendants are adverse to and in conflict with the claim of plaintiff; that this defendant has no knowledge or belief which enables it to determine, and this defendant is unable to determine, whether in law and in fact plaintiff is the owner of and entitled to receive distribution of the net [15] estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, or whether in law and in fact the other defendants are the owners thereof and entitled to receive distribution thereof.

Wherefore, this defendant prays that a judgment be entered (1) determining who, of the parties to this action, is the owner of and entitled to distribution of the net estate and the real property mentioned in the complaint, subject to the payment of expenses of administration, inheritance and estate taxes and debts of the decedent; (2) discharging this defendant from all liability except to the person or persons the court shall adjudge to be the owner or owners thereof

and entitled to distribution thereof, and (3) directing and aiding this defendant in the premises.

JACKSON MADDUX

Attorney for defendant The San Francisco Bank, Executor of the Will of Alvina Wagner

[Endorsed]: Filed May 28, 1943. [16]

[Title of District Court and Cause.]

ANSWER AND CROSS-CLAIM

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner and answer the complaint on file herein as follows:

First Defense

I.

The complaint fails to state a claim against defendants upon which relief can be granted. [17]

Second Defense

I.

That this Court has no jurisdiction over the subject matter in this action.

Third Defense

I.

Defendants above-named admit the allegations contained in paragraphs 2, 3, 4, 5 and 6 of the complaint; allege that they are without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in paragraphs 7 and 8 of the complaint; deny each and every other allegation contained in the complaint.

Cross-Claim

I.

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner died testate on the 6th day of June, 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th of June, 1942, the San Francisco Bank was appointed by the Superior Court of the State of California In and For the City and County of San Francisco, executor of the estate of said deceased, and that thereafter on said day said San Francisco Bank qualified as said executor, and that it is now the duly qualified and acting executor of said estate.

II.

That the Last Will and Testament of said Alvina Wagner was admitted to probate on June 26, 1942 in the Superior Court of the State of California In and For the City and County of San Francisco in that certain matter entitled "In the Matter of the Estate of Alvina Wagner" and given probate file number 90121; that in said Last Will and Testament said Alvina Wagner gave, bequeathed [18] and devised all of her property to Paul Wagner, brother, Fritz Wagner, brother, Olga Kruager, sis-

ter, and Paula Knuppel, niece; that said persons survived said testator; that said persons are, and were at all times mentioned herein, citizens and residents of Germany.

III.

That under the laws of the State of California said Paul Wagner, Fritz Wagner, Olga Kruager and Paula Knuppel are persons ineligible to take either real or personal property or the proceeds thereof by inheritance or testamentary disposition.

IV.

That the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner are the heirs at law of said Alvina Wagner and under the laws of the State of California are entitled to the distribution of the whole of the estate of said Alvina Wagner.

V.

That the estate of the said Alvina Wagner consists of the following property:

(a) Personal Property

Bank Deposits as follows:

The San Francisco Bank	$ 83.58
Bank of America	88.22
Wells-Fargo National Bank	27.06
1928 Hupmobile auto, value	15.00
Furniture at 834 Urbano Drive, San Francisco, California, value	250.00

Furniture at 7525 Geary Street, San Francisco, California, value..... 20.00
Silverware and Jewelry, value 195.00

(b) Real Property

All that real property situated in the City and County of San Francisco, State of California, and described as [18a] follows:

(1) Commencing at a point on the southerly line of Geary Boulevard, distant thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly and along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging,

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the Easterly line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-

five feet; thence at a right angle Northerly one hundred feet to the point of commencement.

Being a part of Outside Land Block No. 882.

Together with all improvements and appurtenances thereunto belonging,

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle Northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly twenty-five feet; thence at right angles

Easterly one hundred and twenty feet to the point of beginning.

Being a portion of Outside Land Block No. [19] 785. Together with all improvements and appurtenances thereunto belonging.

Wherefore, defendants above-named pray judgment that plaintiff take nothing by his complaint; that the Court determine it has no jurisdiction over the subject matter herein; that the Court determine that the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner are entitled to distribution of the whole of the estate of said Alvina Wagner; and for such other and further relief as to the Court seems equitable.

S. C. MASTERSON

Attorney for Defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner

State of California
County of Contra Costa—ss.

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California, and has his office in Richmond, Contra Costa County, California, and is the attorney for defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner in the above entitled action; that defendants are unable to make the verification because they are absent from said county

and for that reason affiant makes this verification on defendants' behalf; that he has read the foregoing Answer and Cross-Claim and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON

Subscribed and sworn to before me this 7 day of July, 1943.

[Seal] A. A. ALSTROM

Notary Public in and for the County of Contra Costa, State of California [20]

Copies mailed to:

(1) Frank J. Hennessy
422 Post Office Building
San Francisco, California
Attention: Wilber Mathewson

(2) A. Matt Werner
General Counsel
Office of Alien Property Custodian
Washington, D. C.

(3) George A. McNulty
Chief, Alien Property Unit
War Division, Department of Justice
Washington, D. C.
Attention: Wallace H. Walker

(4) The San Francisco Bank
526 California Street
San Francisco, California

[Endorsed]: Filed July 8, 1943. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION

To S. C. Masterson, Esq., Attorney at law, Room 105 Syndicate Bldg., 337 10th Street, Richmond, California;

Jackson Maddux, Esq., Attorney at law, 333 Montgomery Street, San Francisco, California;

Robert W. Kenny Attorney General for the State of California, State Building, San Francisco, California:

Please take notice that on Saturday, July 31, 1943, at the hour of 10:00 A.M. in the Courtroom of Judge Louis E. Goodman, Post Office Building, San Francisco, the plaintiff above-named will move the Honorable Court for judgment on the pleadings in the above-entitled case as against all of the defendants. A copy of the said Motion is enclosed herewith.

Dated: July 24, 1943.

FRANK J. HENNESSY
United States Attorney.
By W. E. LICKING
Ass't U. S. Atty. [22]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff moves the court for judgment on the pleadings against all defendants herein.

FRANK J. HENNESSY
United States Attorney
7th and Mission Streets
San Francisco, California
GEORGE A. McNULTY
Chief, Alien Property Unit,
War Division
Department of Justice
Washington, D. C.
Attorneys for the plaintiff.

[Endorsed]: Filed July 26, 1943. [23]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 17th day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Louis E. Goodman, D.J.

[Title of District Court and Cause.]

No. 22563-G Civil

The motion to strike complaint and the motion of the plaintiff for summary judgment having been heretofore heard and submitted, being now fully considered, and the Court having filed its written opinion thereon, it is Ordered, in accordance with said opinion, that the motion to strike the complaint be and the same is hereby denied; that the motion of the plaintiff for summary judgment be and the same is hereby granted, and that a decree be entered herein granting the relief prayed for by plaintiff. [24]

[Title of District Court and Cause.]

Frank J. Hennessy
United States Attorney
San Francisco, Cal.

Thos. C. Lynch
Deputy United States Attorney
San Francisco, Cal.

A. Matt Werner
General Counsel, Office of Alien Property Custodian
Washington, D. C.

Geo. A. McNulty
Chief Alien Property Unit War Division, Dept. of Justice
Washington, D. C.

Wallace H. Walker
Chief Trial Attorney, Alien Property Unit,
War Division,
Dept. of Justice,
Washington, D. C.

Harry LeRoy Jones
Special Asst. to Attorney General
Washington, D. C.
Attorneys for Plaintiff [25]

S. C. Masterson,
Richmond, Cal.
Attorney for defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner.

Jackson Maddux,
331 Montgomery Street,
San Francisco, Cal.
Attorney for Defendant.
The San Francisco Bank.

Robert W. Kenny,
Attorney General of the State of California, and

T. A. Westphal, Jr.,
Deputy Attorney General
as amici curiae on behalf of the State of California.

Matt Wahrhaftig,
Attorney at Law,
Bank of America Bldg.,
Oakland, California,
as amicus curiae.

H. W. Falk, Jr.,
Attorney at Law,
Ukiah, Cal.,
as amicus curiae.

OPINION

Goodman, District Judge.

Alvina Wagner, a resident of California, died June 6, 1942. By her last Will and Testament, dated December 23, 1941 and admitted to probate in the Superior Court of the State of California June 26, 1942, she bequeathed all her property (several parcels of real property in San Francisco, California and some personal property of minor value) to two brothers, one sister and one niece, all nationals and residents of Germany. Six nieces and nephews, residents of California, petitioned the Superior Court as heirs of decedent for distribution of the estate to them, claiming that the German legatees were ineligible as beneficiaries [26] under Section 259, 259.1 and 259.2 of the California Probate Code, (effective July 1, 1941) which in substance provides that the right of aliens abroad to take real or personal property in the United States by will or descent, is conditioned upon the existence of a reciprocal right of Americans abroad and that such reciprocal right being absent, American heirs take. No determination of heirship has been made by the Superior Court.

On January 23, 1943, the plaintiff Alien Property Custodian, under the authority of Section 5 (b) of

the Trading with the Enemy Act, as amended by Title III of The First War Powers Act, 1941, and Executive Order 9095 of July 6, 1942, by vesting order 762, vested in himself for the use of the United States all the right title and interest of the German legatees in the estate of Alvina Wagner.

On April 6, 1943, plaintiff as Alien Property Custodian filed this action against The San Francisco Bank as executor of the Wagner Will and the six claimant heirs, for a judgment vesting ownership of the property of the estate, subject to the payment of administration expenses, inheritance and estate taxes and debts of decedent, in plaintiff and determining that defendant heirs have no right or claim thereto and ordering defendant executor to deliver over the net estate to plaintiff.

By separate answers, the defendant executor and the individual defendants claim lack of jurisdiction of this Court and allege that the individual defendants are entitled to inherit the property of the estate under California law. Defendants move to strike the complaint for lack of jurisdiction. Plaintiff moves for summary judgment in favor of plaintiff. *Both motions have been argued and submitted. All [27] parties agree that no question of fact is involved and that the cause may be determined on the motions submitted.

The issues presented for determination are:

1. Has this court jurisdiction of the subject matter?

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*(Rule 56 Rules of Civil Procedure.)

2. Is the cited California probate statute constitutional? If it is not, the property in probate should vest in plaintiff.

Plaintiff invokes the jurisdiction of this Court under 36 Stat. 1091; 28 U.S.C.A. 41 (1), being "a suit of civil nature . . . in equity, brought by the United States or by any officer thereof authorized by law to sue," and the Trading with the Enemy Act (40 Stat. 411) 50 U.S.C.A. Appendix Sec. 17, (40 Stat. 425) whereby the District Courts "are given jurisdiction to make and enter . . . all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act."

Defendants and amici curiae claim lack of jurisdiction asserting the action is in rem to determine title to property and would oust the state court of previously acquired jurisdiction of the res. (citing U. S. v. Bank of New York Co. 296 U. S. 463.)

Section 5 (b), the pertinent provision of the Trading with the Enemy Act, provides as follows:

> "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—
>
> * * * * * * *
>
> B. investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, with-

drawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has an interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property [28] or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, . . ."

The Trading with the Enemy Act was originally enacted October 6, 1917 c. 106 40 Stat. 411, was twice amended in 1918 (40 Stat. 459; 40 Stat. 1020; again amended in 1919 (41 Stat. 35); again amended in 1920 (41 Stat. 977); again amended in May 1940 (54 Stat. 179) and once more on December 18, 1941 by the First War Powers Act (55 Stat. 839). It is strictly a war measure, finding its authority in Art. 1 § 8 Cl. 11 of the Constitution. Brown v. U. S. 8 Cranch 109; Miller v. U. S. 11 Wall. 268. By its terms, the President is granted wide authority to sequester, administer and dispose of alien enemy property in the United States and to proceed summarily and promptly to that end.

The judicial power, when properly invoked, under the Statute, should function in like manner.

Art. 1, sec. 8 cl. 11 of the Constitution empowers the Congress: "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water." The powers granted to the President in the Trading with the Enemy Act include the power to make "captures" on land. The sequestering of alien enemy property under vesting orders by the Alien Property Custodian, who is the President's agent, is in the nature of a "capture" under Art. 1 sec. 8 cl. 11 of the Constitution. Shoehr v. Wallace, 255 U. S. 239, 242. [29]

The important question here presented is whether Federal jurisdiction in aid of the enforcement of this war statute, cannot be invoked because the property, sought to be vested, is in course of probate in the State court.

The jurisdiction of the Federal Courts is derived from the Constitution and Congressional enactments. It is not subject to restriction or ouster by State legislation e. g State probate procedural statutes. (Miami County Natl. Bank v. Bancroft, 121 Fed. (2d) 921, 10 Cir.) Payne v. Hook, 7 Wall. 425.

It is clear to me that the Congress intended that alien property in the United States should be "frozen" wherever found and held and administered only in the interest of and for the benefit of the United States. A complete Federal dominance in every respect over alien rights and property, to the exclusion of state or local agencies, was obvi-

ously purposed. Economic warfare, as an aid to the defeat of the enemy, can only be effective if it is centralized and possesses over-all control.

It follows that the Federal Courts, granted by the Congress the power to issue decree and process in aid of the statute, have jurisdiction to enforce by decree, vesting orders of the Alien Property Custodian.

It if appeared that the property bequeathed was unquestionably vested in United States citizens resident in California, then obviously there would be no basis for claiming Federal jurisdiction. Here, however, the validity of the State statute under which the California heirs make claim, is in issue and this, itself, furnishes the grounds for Federal jurisdiction.

The California statute (Probate Code 259, 259.1 and 259.2) reads: [30]

> § 259. "Aliens residing abroad: Dependance of rights upon reciprocity. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are in-

habitants and citizens and upon the rights of citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries. (Added by Stats. 1941, Ch. 895 § 1; effective July 1, 1941.)

§ 259.1. Same: Burden of establishing that rights are reciprocal. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259. (Added by Stats. 1941, Ch. 895, § 1; Effective July 1, 1941.)

§ 259.2. Same: Disposition of property on finding of non-reciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property. (Added by Stats. 1941, ch. 895, § 1; Effective July 1, 1941.")

By the foregoing statute, California attempted to enter a field of exclusive Federal jurisdiction.

It is contended by defendants that the Probate Statute is a mere pronouncement of a rule of succession and testamentary disposition. That such is not the fact appears conclusively from the enabling clause which discloses the purpose of the statute to be:

"Sec. 2. This act is hereby declared to be an urgency measure necessary for the immedi-

ate preservation of [31] the public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.

The emphasized portions of the above "purpose" clause disclose that the California State Legislature did not adopt the probate statute as an orthodox procedural rule to regulate succession to property in the ordinary course.

To the contrary, the expressed design was to fix a policy of international relations, which, the Legislature thought, would aid the United States in anticipated hostilities with a foreign government. If this were a valid exercise of state authority, by the same token, it could regulate aliens in other respects, by requiring registration, payment of fees, etc.,—all matters within the exclusive Federal field (Hines v. Davidowitz, post.) Granted the patriotic impulse prompting the enactment of the State statute, nevertheless it invades the Federal [32] field.

The Attorney General of California and other amici curiae argue that plaintiff's vesting order has no res to which to attach itself, inasmuch as under the California Probate Code, the title to the real estate involved is already vested in California heirs. If it appeared from the record that the title to the property was unquestionable, the point might be good. Here, however, the property was willed to alien nationals, and, but for the cited probate section, would so pass.

The Attorney General contends that in determining the issue presented, this court unlawfully enters the domain of State probate procedure. I do not find this to be so. The relief besought asks no more than a determination vesting the interests of the aliens in the Alien Property Custodian. The State probate procedure itself is to be untouched. See Commonwealth v. Bradford, 297 U. S. 613.

The California statute is invalid and unconstitutional because the State of California attempted, by the probate statute in question, to enter the field

of foreign relations, a domain reserved exclusively to the Federal government, free from local interference. United States v. Curtiss-Wright Export Corporation, 299 U. S. 304; U. S. v. Belmont, 301 U. S. 324.

At the time the California statute was adopted (July 1941) there was in effect, between the United States and Germany, a treaty providing for reciprocity of inheritance rights between the two nations. (Treaty of Friendship, Commerce and Consular Rights, dated December 8, 1923; ratification exchanged October 14, 1925; proclaimed October 14, 1925; 44 Stat. (part 3) 2132).

Prior to the adoption of the California statute, the [33] Congress had in May 1940 amended the Trading with the Enemy Act to provide for "freezing" control over financial transactions.

It is contended that the Treaty above referred to was abrogated by war (December 7, 1941) and hence California was free to enter the field. Head Money Cases 112 U. S. 580; Society for Propogation of Gospel v. New Haven, 8 Wheat. 464. It is not beyond question that war did in fact abrogate the treaty. Assuming that it did, by the amendment of the Trading with the Enemy Act in May 1940, the Congress clearly evidenced the intent that the Federal Government should occupy the field to the exclusion of State or local legislation. In Hines v. Davidowitz, 312 U. S. 52, at 62, Mr. Justice Murphy clearly states that:

> "When the national government by treaty or statute has established rules and regulations

touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. . . . The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

cf. Chy Lung v. Freeman, 92 U.S. 275, 279.

The Attorney General of California urges that the California Probate Court is a properly equipped and functioning court fully qualified to determine the questions presented in due course and that the Federal Court should "decline" jurisdiction. In view of what has been said infra re the authority and power granted to the President under the Trad- [34] ing with the Enemy Act and the mandate to the Federal Court to issue decrees and process in aid thereof, it is my view the jurisdiction should be exercised, not declined.

Neither a desire to deprive California heirs of property vesting in them under the existing California law nor a purpose to increase the holdings of plaintiff as Alien Property Custodian has any part in this decision. That California heirs, in preference to alien enemies, cannot succeed to the property

of this estate, is perhaps regrettable. However, the decision herein must rest on broader grounds.

If the limitation of the powers of the state were not sustained in principle, evils now incapable of definition, would result from state entry into the Federal field.

My conclusion is that this court has jurisdiction. Having jurisdiction, the court determines that the state probate act is unconstitutional, being an invasion of the Federal province.

The motion to strike the complaint is denied. The motion of the plaintiff for summary judgment is granted and a decree will enter granting the relief prayed for by plaintiff.

Dated: November 17th, 1943.

[Endorsed]: Filed Nov. 17, 1943. [35]

In the Southern Division of the United States District Court for the Northern District of California.

No. 22563-G

LEO T. CROWLEY, as Alien Property Custodian,
Plaintiff,

vs.

ALVINA ALLEN, and others,
Defendants.

JUDGMENT

This cause came on to be heard on the plaintiff's motion for judgment on the pleadings and on the

motions of the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner (which defendants will, for convenience, be hereinafter designated as "the six defendant heirs") to strike the complaint and to dismiss the complaint, and was argued by counsel for the parties, and briefs were submitted by counsel for the parties and by various amici curiae. Upon consideration thereof it appears to the court that the plaintiff is entitled to judgment in his favor on the undisputed facts in the pleadings.

It is therefore ordered, adjudged and decreed as follows:

1. The plaintiff's motion for judgment on the pleadings is granted.

2. The motion of the six defendant heirs to strike the [36] complaint is denied.

3. The motion of the six defendant heirs to dismiss the complaint is denied.

4. The provisions of California Statutes 1941, Chapter 895, which amended the California Probate Code by adding Sections 259, 259.1 and 259.2, contravene the provisions of Article I, Section 8, Clause 11 of the Constitution of the United States, and are therefore invalid.

5. That statute also invades, and interferes with the exercise of, the Federal Government's power over foreign affairs, and is therefore invalid.

6. The devises and legacies given by the will of Alvina Wagner, deceased, to Paula Knuppel, Olga Kruager, Fritz Wagner and Paul Wagner are

valid. Upon the death of that testatrix, title to her estate vested in those devisees and legatees, subject to administration and to the payment of expenses of administration, debts, and taxes.

7. By virtue of Vesting Order No. 762, issued by the plaintiff as Alien Property Custodian on January 23, 1943, the plaintiff acquired all right, title, interest and claim of the aforenamed devisees and legatees in and to the estate of the late Alvina Wagner.

8. None of the six individual defendants has any right, title or interest in or to the estate of the late Alvina Wagner.

9. The plaintiff is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes.

Dated this 28th day of December 1943.

LOUIS GOODMAN,
District Judge.

[Endorsed]: Filed Dec. 28, 1943. [37]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Frank J. Hennessy, Esq.
Geo. A. McNulty, Esq.
Wallace H. Walker, Esq.
Harry LeRoy Jones, Esq.
A. Matt Werner, Esq.
S. C. Masterson, Esq.
Jackson Maddux, Esq.
Matt Wahrhaftig, Esq.
H. W. Falk, Jr., Esq.
Robert W. Kenny, Esq., Attorney General
R. A. Westphal, Jr., Esq., Deputy

You Are Hereby Notified that on December 28, 1943, a Judgment was entered of record in this office in the above entitled case.

G. W. GALBREATH,
Clerk, U. S. District Court.
lj

San Francisco, California, December 29, 1943.
Notice Mailed of Entry of Judgment on Dec. 29, 1943. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, defendants above

named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 28, 1943.

S. C. MASTERSON

Attorney for Appellants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.

337 Tenth Street
Richmond, California

[Endorsed]: Filed Mar. 27, 1944. [39]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The following is hereby designated as the record on appeal:

(1) Complaint and exhibits thereto.

(2) Defendant's Motion to Strike.

(3) Answer and Cross-Claim of Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner. [40]

(4) Plaintiff's Motion for Judgment on Pleadings.

(5) Notice to Enter Judgment.

(6) The Opinion of Judge Goodman.

(7) The Judgment.

(8) Notice of Entry of Judgment.

(9) Notice of Appeal.

(10) Designation of Record on Appeal.

(11) Statement of Points.

S. C. MASTERSON

Attorney for Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.

337 Tenth Street

Richmond, California

[Endorsed]: Filed March 27, 1944. [41]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a statement of the points upon which the appellants intend to reply upon this appeal:

(1) That the Federal Court has no jurisdiction over the subject matter.

(2) That California Probate Code section 259, 259.1 and 259.2 are constitutional and valid and apply to the property involved herein. [42]

(3) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany does not abrogate the right of the state of California to regulate succession and testamentary disposition of either (a) personal property or (b) real property.

(4) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany is either abrogated or suspended by war between the contracting powers.

(5) The California statute (Calif. Probate Code sec. 259) speaks as of the date of death of the testatrix and the non-resident alien enemies acquired no interest which the Alien Property Custodian could vest.

(6) That the Trading with the Enemy Act, as amended, and the Executive Orders made thereunder suspended the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany.

S. C. MASTERSON
Attorney for Appellants
337 Tenth Street
Richmond, California

[Endorsed]: Filed Mar. 27, 1944. [43]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 43 pages, numbered from 1 to 43, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Leo T. Crowley, Etc. of Plaintiff, vs. Alvina Allen, et al., Defendants. No. 22563-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and

certifying the foregoing transcript of record on appeal is the sum of Five Dollars and ninety cents ($5.90) and that the said amount has been paid to me by the Attorney of the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 28th day of April A.D. 1944.

[Seal] C. W. CALBREATH, Clerk
WM. J. CROSBY,
Deputy Clerk

[Endorsed]: No. 10760. United States Circuit Court of Appeals for the Ninth Circuit. Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner, Appellants, vs. Leo T. Crowley, as he is Alien Property Custodian, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 1, 1944.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 10760

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Appellants,

vs.

LEO T. CROWLEY, as he is ALIEN PROPERTY CUSTODIAN,

Appellee.

ADOPTION OF DESIGNATION OF RECORD AND STATEMENT OF POINTS

I hereby adopt the Designation of Record and Statement of Points filed in the District Court as a compliance with the provisions of Rule 19 of the Rules of this Court.

S. C. MASTERSON
Attorney for Appellants
337 Tenth Street
Richmond, California

[Endorsed]: Filed May 10, 1944. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10760

ALVINA ALLEN, GERTRUDE DENWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Order of substitution of appellee

Leo T. Crowley having resigned as Alien Property Custodian of the United States on March 27, 1944, and James E. Markham having succeeded to the office of Alien Property Custodian by appointment of the President on March 27, 1944, and having consented to his substitution as appellee in place of Leo T. Crowley,

It is hereby ordered, this 17th day of August 1944, that James E. Markham as Alien Property Custodian be substituted as appellee in the place of said Leo T. Crowley.

CURTIS D. WILBUR,
Judge of the Above-Entitled Court.

We hereby consent to the making and entry of the foregoing order:

[SEAL]

JAMES E. MARKHAM,
Alien Property Custodian of the United States.
FRANK J. HENNESSY,
United States Attorney.
W. E. LICKING,
Assistant United States Attorney,
Attorneys for Plaintiff and Appellee.
S. C. MASTERSON,
JACKSON MADDUX.
Attorneys for Defendants and Appellants.

(Endorsed) Order of substitution of Appellee. Filed August 17, 1944. Paul P. O'Brien, *Clerk.*

634719—45

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt From Proceedings of Wednesday, December 13, 1944

Before: WILBUR, GARRECHT, and STEPHENS, *Circuit Judges*

Order of submission

Ordered appeal herein argued by Mr. S. C. Masterson, counsel for appellants, and by Mr. Wallace Walker, Attorney, Department of Justice, counsel for appellee, and by Mr. Everett W. Mattoon, Deputy Attorney General of the State of California, as counsel for the Attorney General of California, as amicus curiae, and submitted to the court for consideration and decision.

Excerpt From Proceedings of Wednesday, January 24, 1945

Before: WILBUR, GARRECHT, and STEPHENS, Circuit Judges

Order directing filing of opinion and filing and recording of decree

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10760. Jan. 24, 1945

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division

Before: WILBUR, GARRECHT, and STEPHENS, Circuit Judges

WILBUR, Circuit Judge: The Alien Property Custodian brought this action for a declaratory judgment against certain relatives of Alvina Wagner, alleging that the property involved had been covered by a vesting order and that he was entitled to possession thereof. He alleged that probate proceedings were in process in the superior court and that in that action a proceeding to deter-

mine heirship (Cal. Prob. Code, §§ 1080–1082) had been filed and was pending at the time he brought his complaint.

Decedent left a will in which she devised and bequeathed the property to a brother, two sisters, and one niece, who were at the time this action was brought, residents of Germany and alien enemies of the United States. The custodian sought an order that none of the heirs, either those who were residents or non-residents, were entitled to take any part of the estate and upon that basis asked the court to order the executor to pay the entire net estate to the plaintiff upon the allowance of his final account as executor. The trial court so ordered and this appeal followed.

The most important question is that of jurisdiction. The custody of the property, according to the allegations of the complaint, is in the executor acting for the probate court. That court is charged with the responsibility of determining the heirship and also of determining the effect of the will left by the deceased. Such proceeding had been inaugurated and was pending at the time the proceeding herein was filed. The custodian claims the right to invoke the jurisdiction of the federal court on the ground that he is acting for the government of the United States and under the provisions of 28 U. S. C. A. § 41 (1) he is entitled to prosecute his proceeding in the federal district court. The section relied upon does not give jurisdiction over matters of probate which are not cases or controversies within the meaning of Art. III of the Constitution. The Case of Broderick's Will, 88 U. S. 503, 517; Byers v. McAuley, 149 U. S. 608, 615.

In view of the fact that the matter is within probate jurisdiction and that court is in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court. There is no reason why the custodian cannot present his claims to the property in that court. U. S. v. Bank of New York Co., 296 U. S. 463, 479; Trout v. Ogilvie, 41 Cal. App. 167; 182 Pac. 333; Estate of Burton, 93 Cal. 459; 29 Pac. 36; Estate of Belshaw, 190 Cal. 278; 212 Pac. 13.

The question as to whether or not the government should be finally successful in its claim is not involved in this appeal, if the district court had no jurisdiction to pass upon the matter.

It is suggested that the war situation has changed the applicable law and that the federal government through its custodian can use its own courts for determination of the destination of property belonging to alien enemies. It is sufficient for the present purpose to say that no such legislation has been passed by Congress.

Judgment reversed and case ordered dismissed.

(Endorsed:) Opinion. Filed Jan. 24, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10760

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Decree

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the case.

(Endorsed:) Decree. Filed and entered January 24, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

(Title of Cause and Number)

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under Rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-five (55) pages, numbered from and including 1 to and including 55, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Charles Fahy, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of February 1945.

[SEAL]

PAUL P. O'BRIEN,
Paul P. O'Brien,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1945

Supreme Court of the United States

Order allowing certiorari

Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE, 1945

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In the Supreme Court of the United States

OCTOBER TERM, 1944

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN,
PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER AND RUDOLPH WAGNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of James E. Markham, Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 29) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 50) is reported in 147 F. 2d 136.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a federal district court has jurisdiction of an action *in personam* brought by the Alien Property Custodian against an executor and resident heirs to determine the interest he has acquired by virtue of an order vesting the right, title and interest of alien enemy legatees, the will having been admitted to probate in a state court but no adjudication having been made there with respect to devolution of the estate.

STATUTES INVOLVED

The pertinent provisions of Section 24 (1) of the Judicial Code as amended (28 U. S. C. 41 (a)), and of Sections 5, 7 and 17 of the Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31), are set forth in the Appendix, pp. 13–15.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 2, 7). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942 (R. 3, 6–7) in the Superior Court of the

City and County of San Francisco. By this will she left her entire estate, comprised of real and personal property, to four heirs-at-law, all residents and nationals of Germany (R. 3, 6, 8, 10). On December 30, 1942, six other heirs-at-law residing in the United States filed in the Superior Court a petition for determination of heirship (R. 7–9), claiming that under the provisions of California Statutes, 1941, Chapter 895,[1] the German legatees were ineligible as beneficiaries and that the American heirs should therefore inherit the decedent's estate. There has never been a hearing on this petition.

On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762 (R. 10) by which he vested in himself all right, title and interest of the German legatees in the estate of Alvina Wagner. On April 6, 1943, the Custodian commenced an action in the District Court against the executor and the six California claimants (R. 2), seeking a judgment determining that the resident claimants have no interest in the estate,

[1] The statute purports to limit inheritance by nonresident aliens to nationals of countries which grant reciprocal rights to American citizens. There are similar statutes in Arizona, 3 Ariz. Code (1939), Sec. 39-111; Montana, Laws of Mont. (1939), ch. 104, p. 219; Nevada, 2 Nev. Laws (Supp. 1931–1941), Sec. 9894; Oklahoma, 60 Okl. St. Ann. (1936), Sec. 121; Oregon, 5 Oregon Comp. Laws Ann. (1940), Sec. 61–107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167, and 177. See also 2 Gen. Stats. of Conn. (1930 Rev.), Sec. 5055.

that the Custodian is entitled to distribution and is the owner of certain specified real property, and ordering the executor to pay the entire net estate to the Custodian upon the allowance by the state court of the executor's final account (R. 4–5).

On May 25, 1943, the defendants filed a motion to strike the complaint upon the ground that the court had no jurisdiction over the subject matter of the action (R. 15), and on July 8, 1943, they filed an answer and a cross-claim, which included a motion to dismiss (R. 18). On July 26, 1943, the Custodian filed a motion for judgment on the pleadings (R. 26). On November 17, 1943, the District Court denied the motion to strike the complaint, granted the Custodian's motion for judgment on the pleadings, and ordered entry of a decree granting the relief demanded by the Custodian. Judgment thereon was entered on December 28, 1943. (R. 40.)

The District Court held that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 34); that its jurisdiction is derived from the Constitution and laws of the United States and is not subject to restriction or ouster by state legislation (R. 33); and that California Statutes, 1941, Chapter 895, is invalid as an attempt by the state to enter the field of foreign relations (R. 37). The District Court held, therefore, that the Alien Property Custodian has acquired the interests of the German nationals in

the estate of the late Alvina Wagner; that none of the defendants has any right, title or interest in the estate; and that the Alien Property Custodian is entitled to receive the net estate in distribution after the payment of expenses of administration, debts and taxes (R. 40).

The defendant heirs appealed[2] to the Circuit Court of Appeals for the Ninth Circuit, which reversed the judgment without passing upon the merits of the Custodian's claim, upon the ground that the District Court was without jurisdiction of the subject matter of the action (R. 50–51). The Circuit Court of Appeals held that since "the matter is within probate jurisdiction and that court [i. e., the state probate court] is in possesison of the property, its right to proceed to determine heirship cannot be interfered with by the federal court" (R. 51).

REASONS FOR GRANTING THE WRIT

1. *The decision of the court below that the District Court lacked jurisdiction under Section 24 (1) of the Judicial Code is contrary to decisions of this Court and of other Circuit Courts of Appeals.*

Section 24 (1) of the Judicial Code confers original jurisdiction upon the district courts of "all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue." On its face,

[2] The defendant executor, The San Francisco Bank, did not appeal.

this proceeding by the Custodian is a "suit of a civil nature * * * in equity" brought by an officer of the United States authorized to sue, and therefore within the scope of Section 24 (1) of the Judicial Code. To hold nevertheless that the suit cannot be maintained in the federal courts it is necessary to conclude, as did the court below, that this is a matter of probate impliedly excluded from the broad jurisdictional grant. This conclusion is inconsistent with many decisions of this Court which clearly establish that proceedings of this kind are not matters of probate within the exclusive jurisdiction of the state courts.

Where "the entire rights of the parties" depend upon "the establishment or non-establishment of the will," the question is "entirely and exclusively within the jurisdiction of the Probate Court." *Case of Broderick's Will,* 21 Wall. 503, 517; see also *Farrell* v. *O'Brien,* 199 U. S. 89. Similarly, where an out of state claimant of an interest in an estate seeks to have the administration *in rem* conducted under the supervision of a federal court, the matter has been held to be one "of strict probate" and therefore "not within the ordinary equity jurisdiction of the federal courts." *Sutton* v. *English,* 246 U. S. 199, 205. But in the present case the will has already been admitted to probate and the petitioner does not seek to have it withdrawn. And, as the District Court recognized, "the State probate procedure itself is to be un-

touched." (R. 37.) The Custodian seeks only a determination of his interest. The relief sought, far from calling for interference with the continuation of administration in the probate court, assumes that the estate will remain in the hands of the executor until the allowance of its final account. (See R. 5.)

In similar situations this Court has uniformly upheld the jurisdiction of federal courts. A comprehensive review of the decisions prior to 1909, set forth in Mr. Justice Day's opinion for the Court in *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, reveals consistent adherence to the principle that federal courts will assume jurisdiction "to determine and award by decrees binding *in personam* * * * shares in * * * estates" (p. 45). In that case an out of state claimant of a share of a Louisiana decedent's estate filed a bill in equity in a federal court to establish her interest. The executor and legatees named in the will, which had been admitted to probate, were defendants. The claimant prayed for a decree that certain legacies and residual bequests were invalid and devolved to her as next of kin; that the executor be ordered to pay over the whole amount of the invalid legacies and bequests; and that an account be taken to show the residue in the hands of the executor. The decision of this Court affirmed federal jurisdiction

to determine the claimant's interest and render a judgment binding "as against the executor, and the interest of the persons before the court," concluding that such relief would not "interfere with the possession of the probate court." (215 U. S. at 50.)

The Custodian has asked here only that the District Court make a determination of his rights *in personam*. All matters of administration—accounting, expenses, taxes, and indeed the ultimate distribution—are to be performed under the supervision of the state court. If, in spite of the petitioner's recognition of continuing state court jurisdiction, the court below construed the complaint (R. 2)as seeking *in rem* relief also, the court could have limited the relief to that clearly allowable. But in denying jurisdiction *in toto,* it has plainly made a determination in conflict with *Waterman* v. *Canal-Louisiana Bank Co.,* and the numerous other decisions before and since which affirm the same established jurisdictional principles. See, *e. g., Commonwealth Co.* v. *Bradford,* 297 U. S. 613, 619, and *Fischer* v. *Amer. United Ins. Co.,* 314 U. S. 549. It is immaterial that in these cases federal jurisdiction rested upon diversity of citizenship rather than, as here, upon the fact that the suit was instituted by an officer of the United States. If the phrase "suits * * * in equity," as used in Section 24 (1) of the Judicial

Code, comprehends in diversity cases the determination of interests in decedents' estates, there is no ground for giving it a different meaning here.

The decision of the court below also conflicts with decisions of other circuit courts of appeals which have followed the rule laid down in the *Waterman* case. *E. g., Miami County National Bank* v. *Bancroft,* 121 F. 2d 921 (C. C. A. 10th); *O'Connor* v. *Slaker,* 22 F. 2d 147 (C. C. A. 8th). Moreover, in *Blacker* v. *Thatcher,* 146 F. 2d 255, certiorari denied February 26, 1945, the Circuit Court of Appeals for the Ninth Circuit has itself recently followed the rule of the *Waterman* case, by recognizing federal jurisdiction, where there is diversity of citizenship, to determine and award shares in an estate admitted to probate in state court.

2. *The court below erred in holding that Section 17 of the Trading with the Enemy Act does not establish jurisdiction of the District Court. Its ruling in this respect is in conflict with the judicial construction of Section 17 in the Second Circuit.*

Section 5 (b) (1) of the Trading with the Enemy Act, as amended, provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President." 55 Stat. 839. The Custodian, exer-

cising powers delegated to him by the President (Executive Orders 9095 and 9193), vested the right, title and interest of certain named alien enemies in the estate of the decedent. It is clear that he could himself have determined that a definite part or all of the estate was enemy property and could have vested the property itself instead of vesting only the alien enemies' interests therein. If the Custodian had vested the property itself, it has long been settled by the decisions of this Court that his determination would have been conclusive to establish his paramount right to possession, and that the redress available to other claimants of interests in the estate would have been limited to statutory remedies assertible only in the federal courts. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51.

The Custodian, however, did not issue an order vesting specified property but vested only the unspecified right, title and interest of the named aliens in the estate, leaving the extent of the aliens' share to be determined in a judicial proceeding. Section 17 of the Trading with the Enemy Act confers jurisdiction upon the federal district courts "to make and enter * * * all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act." In seeking

the present determination in the federal courts, the Custodian is, in accordance with Section 17, merely asking for a "decree * * * necessary and proper in the premises to enforce the provisions of this Act." There is nothing in the comprehensive language of Section 17 to suggest its inapplicability to a suit to enforce a vesting order of the Custodian merely because the order relates to property in the administration of a probate court. We believe that the correct interpretation of Section 17 was suggested by Judge Learned Hand in *Kahn* v. *Garvan,* 263 Fed. 909, 912 (S. D. N. Y., 1920):

> * * * The trustee might perhaps file this bill in the New York courts, have his accounts stated, and get binding instructions; but it does not follow that he may not file a bill here as well. Section 17 confers on this court general jurisdiction "to enforce the provisions of" the Trading with the Enemy Act * * *, and if this be a suit ancillary to that purpose the jurisdiction extends so far.

In *Application of Miller,* 288 Fed. 760, the Circuit Court of Appeals for the Second Circuit affirmed an order of the district court requiring an executor under a will admitted to probate in a state court to pay over certain moneys due to German legatees where the Custodian's order had merely called for "every right, title, and interest of said enemy in and to the estate." Here, the

only present relief sought is a judgment *in personam* against the defendant heirs and executor. By denying jurisdiction to grant this limited relief on facts similar to those which in the Second Circuit have been held to support an order for immediate possession under Section 17, the court below has created a conflict in the decisions of the two circuits.

3. *The question presented is of national importance.*

The Custodian has vested the interests of foreign nationals in approximately 2,000 decedents' estates. Whether the federal courts have jurisdiction to vindicate the rights thus acquired by the United States is, therefore, a question of substantial importance in the administration of the Trading with the Enemy Act.

CONCLUSION

It is respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

APRIL, 1945.

APPENDIX

Judicial Code, as amended (28 U. S. C. 41 (1)):

> SECTION 24. The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue * * * or, where the matter in controversy exceeds * * * $3,000, and * * * is between citizens of different States * * *.

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. III, 616):

> (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

SEC. 7 (c) [as amended, 40 Stat. 1020] If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for

the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

SEC. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

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BRIEF FOR THE PETITIONER

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JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 24, 1945 (R. 52). The petition for a writ of certiorari was filed on April 16, 1945, and was granted on May 28, 1945

(R. 53). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a federal district court has jurisdiction of an action brought by the Alien Property Custodian against an executor and resident heirs to determine the interest he has acquired by virtue of an order vesting the right, title and interest of alien enemy legatees, the will having been admitted to probate in a state court but no adjudication having been made with respect to devolution of the estate.

STATUTES INVOLVED

The pertinent provisions of Section 24 (1) of the Judicial Code, as amended (28 U. S. C. 41 (a)), and of Sections 5, 7, 9, and 17 of the Trading with the Enemy Act, as amended (50 U. S. C. App. 1–31), are set forth in the Appendix *infra*, pp. 34–38. The relevant provisions of Executive Order No. 9193, are also set out in the Appendix, *infra*, pp. 38–40.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 2, 7). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942 (R. 3, 6–7) in the Superior Court of the City and County of San Francisco. She purported to leave her entire estate, comprised of

real and personal property, to four heirs-at-law, all residents and nationals of Germany (R. 3, 6, 8, 10). On December 30, 1942, six other heirs-at-law, residing in the United States, filed in the Superior Court a petition for determination of heirship (R. 7–9), claiming that under the provisions of California Statutes, 1941, Chapter 895,[1] the German legatees were ineligible as beneficiaries and that the American heirs should therefore inherit. There has never been a hearing on this petition.

On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762 (R. 10) by which he vested in himself all right, title and interest of the German legatees in the estate of Alvina Wagner. On April 6, 1943, the Custodian brought this action in the District Court of the United States for the Northern District of California against the executor and the six California claimants (R. 2). He sought a judgment determining that the resident claimants have no interest in the estate; that the Custodian is en-

[1] The statute purports to limit inheritance by nonresident aliens to nationals of countries which grant reciprocal rights to American citizens. There are similar statutes in Arizona, 3 Ariz. Code (1939), Sec. 39–111; Montana, Laws of Mont. (1939), ch. 104, p. 219; Nevada, 2 Nev. Laws (Supp. 1931–1941), Sec. 9894; Oklahoma, 60 Okl. St. Ann. (1936), Sec. 121; Oregon, 5 Oregon Comp. Laws Ann. (1940), Sec. 61-107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167 and 177. See also 2 Gen. Stats. of Conn. (1930 Rev.), Sec. 5055.

titled to the entire net estate after payment of expenses of administration, taxes, and debts, if any; and that the Custodian is the owner of certain real property, subject to the payment of expenses, taxes, and debts, if any. The Custodian also prayed for inclusion in the judgment of an order to the executor to pay the entire net estate to the Custodian upon the allowance by the state court of the executor's final account. (R. 4–5.)

On May 25, 1943, the defendants filed a motion to strike the complaint upon the ground that the court had no jurisdiction over the subject matter of the action (R. 15), and on July 8, 1943, they filed an answer and a cross-claim, which included a motion to dismiss (R. 18). On July 26, 1943, the Custodian filed a motion for judgment on the pleadings (R. 26). On November 17, 1943, the district court denied the motion to strike the complaint, granted the Custodian's motion for judgment on the pleadings, and ordered entry of a decree granting the relief demanded by the Custodian (R. 27).

The district court held that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 34); that its jurisdiction is derived from the Constitution and laws of the United States and may not be restricted by state legislation (R. 33); that, notwithstanding a grant of the relief sought by the Custodian, "the State probate procedure itself is to be untouched" (R. 37); and that the California reciprocal inherit-

ance statute is invalid because it purports to operate in "the field of foreign relations, a domain reserved exclusively to the Federal government" (R. 37–38).

Accordingly, in the decree, entered on December 28, 1943 (R. 40–42), the district court granted the Custodian's motion for judgment on the pleadings; denied the defendants' motion to dismiss; declared California Statutes, 1941, Chapter 895, invalid; and declared that the Alien Property Custodian had acquired the interests of the German nationals in the estate, that none of the defendants had any right, title or interest, and that the Alien Property Custodian "is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes."

The defendant heirs appealed[2] to the Circuit Court of Appeals for the Ninth Circuit, which reversed the judgment without passing upon the merits of the Custodian's claim, holding that the district court was without jurisdiction of the subject matter of the action (R. 50–51). The opinion, filed on January 24, 1945, states that since "the matter is within probate jurisdiction and that court [*i. e.*, the state probate court] is in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court" (R. 51).

[2] The defendant executor, The San Francisco Bank, did not appeal.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that this suit is within probate jurisdiction and, therefore, not a case or controversy within the meaning of Article III of the Constitution.

2. In holding that this suit would interfere with the state probate court's possession of the property.

3. In holding that Congress had not authorized the Custodian to invoke the jurisdiction of the federal courts for the determination of interests in alien property.

4. In holding that the district court did not have jurisdiction to entertain this action.

5. In ordering the dismissal of the suit.

SUMMARY OF ARGUMENT

I

In order to effectuate his vesting order, the Alien Property Custodian here invoked the jurisdiction of a federal district court under Section 17 of the Trading with the Enemy Act. This Section has long been interpreted as affording an aid to the Custodian in taking summary possession of alien property for the benefit of the United States in time of war. Had the Custodian vested the property itself, as the statute permits, and not merely the interests of the aliens, he could have seized the property here involved without resort-

ing to any judicial tribunal. The decisions of this Court establish that, in this event, the only judicial remedy available to persons claiming to be entitled to the property is a statutory suit in the federal courts. Moreover, if the Custodian had issued an order vesting the property, he could have invoked the jurisdiction of a federal court to enforce it. That he chose to vest only such right, title, and interest as the aliens had in the property does not deprive the federal court of its jurisdiction to take and settle the question of the superior right of the Custodian in the property before the probate court over that of the other claimants. This is so whether the action be deemed *in personam* or *in rem*.

II

Federal jurisdiction over this cause does not rest on Section 17 of the Trading with the Enemy Act alone. The action clearly falls within the ordinary jurisdiction granted to the district courts by the Judicial Code. Under Section 24 (1) of the Judicial Code, district courts have jurisdiction of "all suits of a civil nature * * * in equity" brought by an officer of the United States. Under this Section, the district court had jurisdiction of the Custodian's action unless, as the circuit court of appeals held, it is a probate proceeding or is otherwise an action interfering with the prior jurisdiction of a state court over a *res*.

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An action for the determination of the validity and amount of an interest in a decedent's estate is not a probate matter and is within the equity jurisdiction of the federal district courts. We recognize that a federal court cannot ordinarily acquire *in rem* jurisdiction over an estate to which the *in rem* jurisdiction of a state probate court has first attached. But an action such as this is not *in rem*. The test for the determination of the *in rem* character of an action is whether the relief sought will interfere with such control of a *res* by the state court as is necessary to effectuate that court's jurisdiction. Applying this test, this Court has held actions to be *in personam* when they are brought for determination of heirship or declaration of interests, and although they are coupled with a prayer that the executor or trustee pay over property, render an account, or both. This Court has also held the action to be *in personam* when it has been necessary, in order to grant the relief sought, to establish the priority of payment from the *res* or to establish a trust against the *res*. The circuit courts of appeals, following the decisions of this Court, have held to be *in personam* various actions relating to property under the control of state courts and involving the establishment and foreclosure of a mortgage and orders to account and pay over.

In his prayer for relief, the Custodian assumed that the estate would remain in the hands of the executor until allowance of its final account

(R. 5), and the decree of the district court provided that the Custodian "is entitled to receive" the property after completion of the functions of administration (R. 42). This is relief *in personam*, and not *in rem*, under the established federal rule.

ARGUMENT

I

SECTION 17 OF THE TRADING WITH THE ENEMY ACT CONFERS JURISDICTION OF THIS ACTION ON THE DISTRICT COURT

Section 5 (b) (1) (B) of the Trading with the Enemy Act, as amended, provides for the vesting of alien property "when, as, and upon the terms, directed by the President" (Appendix, *infra*, p. 35), and by Executive Order No. 9095, as amended by Executive Order No. 9193 (Appendix, *infra*, p. 38), the President delegated to the Alien Property Custodian this and other statutory powers.[3] It is well settled that, pursuant to

[3] See also Executive Order No. 9142 (3 Code Fed. Reg. (Cum. Supp.) p. 1148) which transfers from the Department of Justice to the Alien Property Custodian those powers and functions which were exercised during and after the first World War by the then Alien Property Custodian. It is clear that Section 5 (b) (1) (B) comprehends, *inter alia*, the seizure powers granted by Section 7 (c). Appendix, *infra*, pp. 35–36. See H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2–3; S. Rep. No. 911, 77th Cong., 1st Sess., pp. 2–3. For instances of judicial recognition that the principles governing seizure pursuant to Section 7 (c) are applicable to vesting pursuant to Section 5 (b) (1) (B); see *Stern* v. *Newton*, 39 N. Y. S. 2d 593; *The Pietro Campanella*, 47 F. Supp. 374 (D. Md.); *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S. D. N. Y.); *The Aussa*, 52 F. Supp. 927 (D. N. J.).

the statutory authority thus delegated to him, the Custodian may himself determine that property is owned by a foreign national and may summarily vest the property itself instead of vesting only interests in the property. By so doing, he acquires immediate right to possession, leaving all claimants to pursue the remedies provided by Section 9 (a) of the Act (Appendix, *infra*, pp. 36–37)—application for administrative return or suit for return in the federal courts. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. As the Court said in *Stoehr* v. *Wallace*, at pages 245–246:

> * * * There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts * * *

The paramount policy underlying the grant of authority to make such seizures is that there must be no obstacles to the availability of alien property for wartime use in the interest of the United States. The purpose of the Act was "to accomplish a swift, certain, and final reduction to possession of vast quantities of property involved in incredible complications of ownership and

interest." *Kahn* v. *Garvan,* 263 Fed. 909, 917 (S. D. N. Y.).

The adventitious circumstance that the vested property is in process of judicial administration in no way limits this summary power to seize. To the contrary, pursuant to the broad authority granted to the President by the Act, he has, by Executive Order 9193, par. 2 (f) (Appendix, *infra,* pp. 38–39), expressly conferred on the Custodian the power to take such action as he deems necessary, including the power to vest, with respect to "any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision * * * and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof." The Custodian's power to seize the property here involved without resort to a court is thus unassailable.

The uniform practice of the Custodian, where vested property has not been surrendered on request, has been not to take "with the strong hand", but to invoke judicial aid. See *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 568. To this end, Congress has, by Section 17 (Appendix, *infra,* pp. 37–38), empowered him to bring a possessory action and obtain an order for the delivery to him of the property without the trial of adverse claims to it. He need name as party defendant only the possessor of the property. *Cen-*

tral Union Trust Co. v. *Garvan, supra; Stoehr* v. *Wallace, supra; Commercial Trust Co.* v. *Miller, supra.* It "does not seem to need argument to show," said Mr. Justice Holmes, that a demand, entitled to be made by the Custodian, "could be enforced by the District Courts under Section 17." "It cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand." 254 U. S. at 566, 568.

Here the Custodian vested not the property itself but a chose in action or an undetermined interest in the property. Having made this choice, he was authorized, in order to obtain possession, to call on a federal court to determine his interest. *Kahn* v. *Garvan,* 263 Fed. 909 (S. D. N. Y.).

Section 17 of the Trading with the Enemy Act provides that:

> the district courts of the United States are hereby given jurisdiction to make and enter * * * all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court * * *.

This comprehensive language permits no inference which would bar federal jurisdiction simply because the suit brought relates to property being administered by a probate court. In view of the undoubted power of the Custodian to vest

such property itself and to invoke the aid of a federal court in order to get possession, it would be wholly artificial to read such a limitation into Section 17 when the Custodian chooses to vest the right, title, and interest of the alien rather than the *res*.

It is not surprising, then, that the courts have held that the Custodian may invoke the jurisdiction of the federal courts in suits against testamentary trustees and executors brought to establish his interest. Thus, in *Application of Miller*, 288 Fed. 760, the Circuit Court of Appeals for the Second Circuit affirmed an order of the district court requiring an executor under a will admitted to probate in a state court to pay over moneys due to German legatees where the Custodian's order merely called for "every right, title, and interest of said enemy in and to the estate." See also *Kahn* v. *Garvan*, 263 Fed. 909 (S. D. N. Y.); *In re Miller*, 281 Fed. 764 (C. C. A. 2).

To argue that the district court had no jurisdiction under Section 17 to entertain the instant action is to disregard the explicit provisions of the Act and the consistent purport of judicial decisions under it. Having vested the interests of foreign nationals in the property of the estate, the Custodian has brought an action to define those interests. If it be admitted, as it must be, that the Custodian could have vested the property itself, and could have maintained a summary ac-

tion for immediate possession, then it follows, *a fortiori,* that he may bring an action for the determination of what he has vested, bringing in as defendants all known claimants.

The contention (Br. in Opp., p. 5) that the Custodian may not sue for enforcement of his vesting under Section 17, because there has not yet been a decision in the state court that the property devolved to foreign nationals, ignores the decision of this Court in the *Central Union Trust Co.* case, *supra.* It was there established that judicial determination of ownership by a foreign national is not a prerequisite to the custodian's perfection of rights in seized property, and that those rights are defeasible only through exercise of the remedies prescribed in Section 9 (a).

As has been pointed out, if the Custodian chooses to vest the right, title, and interest in certain property, rather than vest a *res* which he has himself defined, he "must submit to some judicial determination between himself, as captor, and the [executor] as obligor * * *." He "might perhaps file this bill in the [state] courts * * *; but it does not follow that he may not file a bill here as well. Section 17 confers on this court general jurisdiction 'to enforce the provisions of' the Trading with the Enemy Act * * *, and if this be a suit ancillary to that purpose the jurisdiction extends so far." Judge Learned Hand, in *Kahn* v. *Garvan,* 263 Fed. 909, 912 (S. D. N. Y.). The judicial determination

in the federal courts, adverted to by Judge Hand, is authorized by Section 17. It is precisely what the Custodian seeks in this action.

II

SECTION 24 (1) OF THE JUDICIAL CODE CONFERS JURISDICTION OF THIS ACTION ON THE DISTRICT COURT

The jurisdiction of the district court here need not be rested on the special provisions of the Trading with the Enemy Act. District courts have general jurisdiction, under Section 24 (1) of the Judicial Code, of "all suits of a civil nature * * * in equity, brought by the United States, or by an officer thereof authorized by law to sue * * *." The Alien Property Custodian is an officer of the United States authorized by law to sue. The action is within the jurisdiction of the federal courts, unless, as suggested by the court below, it is a probate proceeding which is not a case or controversy within the meaning of Article III of the Constitution or unless it interferes with the probate jurisdiction of the California court.

A. *This suit is not a probate proceeding.*— That there is no federal jurisdiction over the probate of a will is clear. *Case of Broderick's Will,* 21 Wall. 503. But the Custodian is seeking neither probate of the will nor any interference with the probate proceedings or with the administration of the estate under the control of the state court. What he seeks here is a declaration

of his interest in the estate. Such a declaration is not a probate matter and is within the jurisdiction of the district courts. *Byers* v. *McAuley*, 149 U. S. 608; *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33; *McClellan* v. *Carland*, 217 U. S. 268; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613. See *Sutton* v. *English*, 246 U. S. 199, 205; *Princess Lida* v. *Thompson*, 305 U. S. 456, 467.

The comprehensive review of the decisions prior to 1909 in Mr. Justice Day's opinion for the Court in *Waterman* v. *Canal-Louisiana Bank Co.*, *supra*, reveals constant adherence to the principle that, though the federal court lacks jurisdiction "to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate", it has jurisdiction "to determine and award by decree binding *in personam* * * * shares in * * * estates". 215 U. S. at 45. This is part of the "established equity jurisdiction of the Federal courts, which is like unto the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789". 215 U. S. at 43.

In the course of holding that an action to annul a will is a probate proceeding outside the jurisdiction of a federal court, this Court said, in *Sutton* v. *English*, 246 U. S. 199, 205, that:

> * * * questions relating to the interests of heirs, devisees, or legatees * * * which may

> be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy.

That the action is brought against the executor of the estate does not make it a probate proceeding. Suits against executors and administrators are clearly within federal jurisdiction "when instituted in order to determine the validity of claims against the estate or claimants' interests therein." *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 619.[4]

B. *This suit does not interfere with the* in rem *jurisdiction of the state probate court.*—The Custodian has not denied that probate proceedings in the California Superior Court are *in rem* or that the state court must have control of the *res* in order to complete those proceedings. Cf. Br. in Opp. p. 5. But he does contend that this action in the federal district court is not *in rem* since the relief sought can be granted without any interference with the *res*. The Custodian here sought only a determination of his interest "after payment of expenses of administration, inheritance

[4] Even if a state statute purports to confer exclusive jurisdiction over determinations of heirship in a probate court, a federal equity court may exercise its jurisdiction in favor of creditors, legatees, and heirs to establish their claims. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43.

and estate taxes, if any, and debts of the decedent", and an order that "the defendant executor * * * pay the entire net estate to the plaintiff upon the allowance of its final account as executor." (R. 5.) Ouster of the state court's jurisdiction was not suggested; on the contrary, the Custodian expected to lay his adjudicated interest before that court and ask it for distribution. As the district court stated (R. 37), "The State probate procedure itself is to be untouched."[5] Indeed, the decree of the district court did not order the executor to pay, but merely recited that (R. 42):

> The plaintiff is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, an dtaxes.

Thus, even if the court below, despite abundant authority to the contrary (see *infra*, pp. 20–21), thought that the complaint was *in rem* because an order of payment was sought, the decree actually entered included no such provision and

[5] The law of California is in accord. In *Dickerman* v. *Ahern*, 93 Cal. App. 166, the plaintiff filed a creditor's bill in a state court seeking to subject to his claim the balance after exoneration of certain bonds deposited by the defendant with the United States district court as bail for his brother. The court, although recognizing the principle that one court would not issue process against the officers of another, held that that principle did not apply, for there was no attempt to obtain such process, the plaintiff seeking only a declaration of his right to whatever might remain of the bonds after the district court was finished with them.

should have been upheld. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 45; *Lubbock Hotel Co.* v. *Guaranty Bank & Trust Co.*, 77 F. 2d 152, 155 (C. C. A. 5).

The circuit court of appeals relied upon the principle that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of all other courts (R. 51). But that principle "has no application to a case in a federal court * * * wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court." *Princess Lida* v. *Thompson*, 305 U. S. 456, 466. It applies only where the action in both courts is *in rem* or *quasi in rem*, so that each court, in order to grant the relief sought, must control the *res*. *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477.

The applicable doctrine was clearly outlined by this Court in *United States* v. *Klein*, 303 U. S. 276. In that case, money had been paid into a federal court for unknown beneficiaries of a class suit. The Escheator of Pennsylvania, after a lapse of time, applied to a state court and secured a declaration of escheat of the funds. In upholding the jurisdiction of the state court to make the declaration, the Court said (pp. 281–282):

> While a federal court which has taken possession of property in the exercise of

> the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as the restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property. [Citations.] Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. [Citations.] Similarly a federal court may make a like adjudication with respect to property in the possession of a state court. [Citations.]
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> * * * * * * *
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> * * * At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund * * * and to confirm the authority of appellee to make claim to the moneys.

The leading case in this field, *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, was a suit in a federal court by an out-of-state heir-at-law against the executor and certain beneficiaries of a will. Prayer was made for a declaration that a certain legacy had lapsed and that the property had devolved to the plaintiff, for an order that the executor pay over the property, and for a general accounting. This Court held

the action to be *in personam*. An accounting under the supervision of a federal court, it said, would interfere with the jurisdiction of the state probate court, but, as for the balance of the relief requested (215 U. S. at 46):

> The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally.

This Court has also held to be *in personam* a suit against a testamentary trustee for a declaration of interest and an order directing the trustee to account and pay over. *Mandeville* v. *Canterbury*, 318 U. S. 47. Accord: *Cottingham* v. *Hall*, 55 F. 2d 664 (C. C. A. 4); *Vacuum Oil Co.* v. *Land Title Guaranty & Trust Co.*, 80 F. 2d 476 (C. C. A. 6). And a suit against a state bank liquidator has been held to be *in personam* even where, in addition to establishing the plaintiff's right to receive the money claimed, the court de-

clares a trust therefor against the *res*. *General Baking Co.* v. *Harr*, 300 U. S. 433.

An action in a federal court brought by a receiver of a national bank, appointed by the Comptroller of Currency, against a mortgage pool trustee, appointed by a state court, has also been held to be *in personam*. *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613.* In sustaining the district court's jurisdiction to determine that the plaintiff was entitled to certain payments out of the *res* under the jurisdiction of the state court and to declare that such payments were entitled to priority, the Court compared the situation to the control "exercised by probate courts over such fiduciaries as guardians, administrators, executors, etc." and said, at pp. 619–620:

The jurisdiction of federal courts to en-

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* While *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, established that an accounting under the supervision of the federal court would interfere with the *in rem* jurisdiction of a state probate court, there is language in *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 618, which looks the other way. See also *Cottingham* v. *Hall*, 55 F. 2d 664 (C. C. A. 4). These decisions of this Court were reconciled in *Hegarty* v. *Hegarty*, 46 F. Supp. 319, 320 (D. Mass.): "The federal courts have taken jurisdiction of suits seeking personal judgments against fiduciaries where no accounting—a matter for the probate court—has been sought (*Waterman* v. *Canal-Louisiana Bank & Trust Co.* * * *) and also where an accounting has been sought which did not affect the *res*. *Commonwealth Trust Company of Pittsburgh et al.* v. *Bradford* * * *." In any event, resolution of the issues raised by the case at bar does not call for a reconciliation of the foregoing decisions since no accounting in the federal courts has been requested.

> tertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interest therein. Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. * * *
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> * * * The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment *in personam* was rendered.

The Bradford case is of particular significance here since, unlike most of the cases involving this doctrine which have arisen, federal jurisdiction did not rest on diversity of citizenship, but rather on the ground that the suit, like that at bar, was instituted by an officer of the United States under Section 24 (1) of the Judicial Code. See Appendix, *infra,* p. 34. That the suit is brought by the United States or one of its officers does not deprive a federal court of a jurisdiction which it clearly would have if the suit had been instituted by a nonresident on diversity grounds. *Pufahl* v. *Estate of Parks,* 299 U. S. 217, 225–226; *United States* v. *Peoples Trust and Savings Company,* 97 F. 2d 771, 773 (C. C. A. 7).

Decisions of the circuit courts of appeals, in a variety of factual situations, further confirm the conclusion that this is an action *in personam*. In *Lubbock Hotel Co.* v. *Guaranty Bank & Trust Co.*, 77 F. 2d 152, the Circuit Court of Appeals for the Fifth Circuit upheld federal jurisdiction of a suit to foreclose a mortgage against property in the hands of a receiver appointed by a state court. To preserve the *in personam* nature of the action, the court held that the mortgagee would have to apply to the state court for process to enforce the foreclosure, and ordered modification of the decree of the trial court (p. 155), because that part of the decree which undertook

> * * * completely to direct and control the foreclosure proceedings to be had in the state court, including the making of the allowances against the proceeds, and in effect reserving jurisdiction to proceed with the foreclosure, if the state court did not, * * * would completely oust the state court of effective possession and jurisdiction over the property in its custody, and make it a mere ministerial agent of the federal court.

And the Circuit Court of Appeals for the Seventh Circuit has held an action by the United States against an executor for income taxes owed by the decedent to be *in personam*, saying (*United States* v. *Peoples Trust & Savings Company*, 97 F. 2d 771, 774):

> Here the only relief sought and all that could be obtained is the determination of the validity and amount of the tax claims against decedent's estate. A judgment obtained could not in any way interfere with the orderly process of the administration of the estate in the State Court, or deal with the *res* of the estate or its orderly distribution.

See also *Miami County National Bank* v. *Bancroft,* 121 F. 2d 921 (C. C. A. 10), and *Blacker* v. *Thatcher,* 145 F. 2d 255, which, although indistinguishable from this case, was decided by the court below in accordance with the doctrine established by the foregoing authorities.

The cases in which federal jurisdiction has been denied on the ground that the action in the federal court was *in rem* and interfered with the previously acquired *in rem* jurisdiction of a state court are readily distinguishable. The respondents rely chiefly upon *United States* v. *Bank of New York & Trust Co.,* 296 U. S. 463, in which the United States, as assignee of the Soviet Government, sued in a federal court for an accounting and for delivery of the funds of Russian insurance companies, deposited with the New York Superintendent of Insurance and defendant banks under the control of a New York state court. This Court, finding that the relief sought could not be granted without removing the *res,* its administration, and its disposition, from the control of

the state court, concluded that the action was *in rem*. The action was not one "to establish a debt or a right to share in property, and thus to obtain an adjudication which might be had without disturbing the control of the state court." Instead, the complainant demanded that "the depositaries account and pay over to the complainants, as 'the sole and exclusive owner,' the entire funds in their hands. Thus the object of the suits [was] to take the property from the depositaries and from the control of the state court, and to vest the property in the United States to the exclusion of all those whose claims [were] being adjudicated in the state proceedings." 296 U. S. at 478.

In the instant case, the petitioner did not seek an accounting in the federal court, but only a determination of his interest; he named as defendants all adverse claimants to the estate known to him (R. 3) and to the other claimants (R. 8). The relief requested by him and granted by the district court could in no way disturb the control of the state court, for both the complaint (R. 5) and the decree (R. 42) contemplated that the petitioner would have to await final distribution by the state probate court. As this Court said in the *Waterman* case, 215 U. S. 33, 44:

> * * * the debt thus established must take its place and share of the estate as administered by the probate court; and it

> cannot be enforced by process directly against the property of the decedent.

Moreover, if on further proceedings in the probate court, other claimants should appear, it is indisputable that the decree of the district court would not bar them from asserting the rights they might otherwise have. (R. 42.)

Princess Lida v. *Thompson*, 305 U. S. 456, was a suit by a beneficiary against trustees of an *inter vivos* trust being administered under the control of a state court. The prayer was for an accounting, removal of the trustees and restoration by them of trust funds alleged to have been lost through mismanagement. This Court, while declaring that "an action in the federal court to establish the validity or the amount of a claim constitutes no interference with a state court's possession or control of a res," found that (at p. 467):

> No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

The Circuit of Appeals for the First Circuit, in applying the holding in the *Princess Lida* case, takes it to mean that (*Kittredge* v. *Stevens*, 126 F. 2d 263, 267):

> If the issues presented by the complainant involve a consideration of the actual hand-

ling of the trust property by the fiduciaries, then the federal courts would appear to have no jurisdiction.'

"Actual handling" of an estate is not involved here, the only question being the construction and validity of a state statute. The relief sought, as well as the decree granted expressly left matters of administration to the California court.

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[1] *Kittredge* v. *Stevens* was a suit against an administrator and trustee for property to which the plaintiff claimed to be entitled and for an accounting. The circuit court of appeals held that there was no federal jurisdiction "over a case which would involve an examination of the general administration of four estates by a state probate court." 126 F. 2d at 267.

In *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, the complaint was dismissed for want of equity, no decision being made as to federal jurisdiction. That case was an action by an administrator's surety for the appointment of a receiver, for an accounting, for exoneration of the surety, and for a determination of heirship. There was pending in a state court an action to set aside a probate decree, brought by some of the heirs against an heir-administrator. The surety, fearing dissipation of the property awarded to the heir-administrator under the probate decree, brought his action in the federal court. This Court held that a federal equity court should not create a receivership as an end in itself and that the surety sought no end to which the receivership could properly be an ancillary remedy, because his only interest in the matter was his contingent right of exoneration. As between the real disputants, the heir-administrator and the other heirs, there was no diversity of citizenship and no other ground for federal jurisdiction.

C. *The district court properly exercised its jurisdiction.*—The respondents, relying upon *Pennsylvania* v. *Williams,* 294 U. S. 176, *Gordon* v. *Ominsky,* 294 U. S. 186, and *United States* v. *Bank of New York & Trust Co.,* 296 U. S. 463, contend that even if the district court had jurisdiction, "there is well established authority for its relinquishing its jurisdiction in favor of the natural, orderly and adequate procedure of the state court for the administration of the property of the estate." Br. in Opp., p. 9. But these cases hold only that a federal court of equity should not exercise an unquestioned jurisdiction to oust competent state officers from the entire possession and administration of property in their custody. *Gordon* v. *Washington,* 295 U. S. 30, 39,

Pennsylvania v. *Williams, supra,* involved the liquidation of an insolvent building and loan association. After the appointment of a federal receiver to control the property, the Secretary of Banking of the Commonwealth of Pennsylvania petitioned the district court to order its receiver to turn the property over to him so that he might proceed with the liquidation in accordance with the elaborate statutory scheme provided for that purpose. The court refused and was upheld by the circuit court of appeals. This Court, condemning

usurpation of state administrative affairs by the federal courts, held that a court of equity, having before it a bill for a receivership should, as a matter of sound discretion, have directed the surrender of the *res* to the state officer, "charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent." 294 U. S. at 184. *Gordon* v. *Ominsky, supra,* and *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U. S. 189, companion cases to *Pennsylvania* v. *Williams,* presented similar situations and were decided on the same principle.

United States v. *Bank of New York & Trust Co.,* 296 U. S. 463, following *Pennsylvania* v. *Williams,* was, as we have already pointed out (*supra,* pp. 25–26), another case in which the exercise of federal jurisdiction would have operated to remove from the state tribunal the entire administration of a *res.* In that case, moreover, numerous claimants before the state court had not been made parties to the federal suit, and this Court said that "this fact in itself would be a sufficient reason for the District Court to refuse to proceed in their absence." 296 U. S. at 480. That, of course, is not the situation here.

Commonwealth Trust Co. v. *Bradford,* 297 U. S. 613, establishes the inapplicability here of the rule

of *Pennsylvania* v. *Williams*. Holding a receiver of a national bank to be entitled to certain payments out of a mortgage pool being administered by a state court, the court sustained a decree establishing his right to prior payment out of the fund. Of *Pennsylvania* v. *Williams*, the Court said (pp. 619–620):

> The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in *Pennsylvania* v. *Williams*, * * * is not applicable. [There] we found conflict between the federal court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the federal court should retain jurisdiction; its power generally to render judgment *in personam* against fiduciaries appointed by state courts was expressly recognized. Here there are no extraordinary circumstances. As contemplated by Congress the Receiver sought an adjudication of his rights. The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment *in personam* was rendered.
>
> Congress has empowered Receivers of National Banks to sue in federal courts; the

obvious importance of permitting them freely to do so cannot be disregarded.

The decree of the district court in this action affected the administration of the *res* in the hands of the state court no more than did the decree in *Commonwealth Trust Co.* v. *Bradford.* It merely adjudicated the petitioner's interest in the property as against the claimant heirs. Matters properly appertaining to administration—payment of expenses and taxes, the accounts of fiduciaries, and the final distribution of the estate—were left under the supervision of the state court. The entire action was premised on the supposition that the probate court would fully exercise its jurisdiction.

Issues of state law are concededly present in this case but this alone does not justify a declination of federal jurisdiction. *Meredith* v. *Winter Haven,* 320 U. S. 228, 234. It would be wholly inappropriate for a federal court to refuse to hear the federal issue—basic to this case—of the validity, under the Constitution of the United States, of a California statute which, the United States asserts, encroaches upon a domain reserved exclusively to it and fully occupied by the Trading with the Enemy Act and treaties between the United States and other governments (R. 31–40).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed and the case remanded to that court for further proceedings.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX

Judicial Code, as amended (28 U. S. C. 41 (1)):

SECTION 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue * * * or, where the matter in controversy exceeds * * * $3,000, and * * * is between citizens of different States * * *.

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. IV, 616):

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation

or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

* * * * *

SEC. 7 (c) [as amended, 40 Stat. 1020] If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid

over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

SEC. 9 (a) [as amended, 41 Stat. 35, 41 Stat. 977, 42 Stat. 1511]

That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other

property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 17. That the district courts of the United States are hereby given jurisdiction

to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

Executive Order No. 9193, amending Executive Order No. 9095 (3 Code Fed. Reg. (Cum. Supp.) p. 1121), provides, in pertinent part, as follows (3 Code Fed. Reg. (Cum. Supp.) pp. 1174–1177):

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or

national thereof. When the Alien Property Custodian determines to exercise any power and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of such property, except as authorized or directed by the Alien Property Custodian.

* * * * *

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive Order.

* * * * *

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions here-

under, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

13. Any regulations, rulings, instructions, licenses, determinations or other actions issued, made or taken by any agency or person referred to in this Executive Order, purporting to be under the provisions of this Executive Order or any other proclamation, order or regulation, issued under sections 3 (a) or 5 (b) of the Trading with the enemy Act, as amended, shall be conclusively presumed to have been issued, made or taken after appropriate consultation as herein required and after appropriate certification in any case in which a certification is required pursuant to the provisions of this Executive Order.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 1167 60

JAMES E. MARKHAM, Alien Property Custodian,
Petitioner,
vs.
ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 1167

JAMES E. MARKHAM, Alien Property Custodian,
Petitioner,
vs.
ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the District Court (R. 29) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 50) is reported in 147 F. (2d) 136.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 24, 1945. The jurisdiction of this Court is invoked by the petitioner under Section 240 (a) of the *Judicial Code*, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The question presented is whether a federal district court can assume jurisdiction in an *in rem* proceeding to determine heirship and order distribution of the estate of a decedent where the estate is in the process of probate in a state court and where an *in rem* proceeding to determine heirship is pending in said estate in the state probate court.

STATUTES INVOLVED.

The statutes involved are Section 24 (1) of the Judicial Code as amended (28 U.S.C. 41 (1)) which provides that the District Courts have jurisdiction "of all suits of a civil nature, at common law or in equity, brought by the United States or by an officer thereof * * *" and upon the Act of October 6, 1917, 40 Stat. 425, 50 U.S.C., Appendix, Section 17, which provides that the District Courts have jurisdiction to make such orders and decrees as are necessary and proper "to enforce the provisions of this Act".

STATEMENT OF THE CASE.

This is an action by the Alien Property Custodian against the executor of the will of Alvina Wagner, deceased, and against the defendants who are the American heirs at law of the decedent for adjudication of the rights and interests, if any, of the Alien Property Custodian.

The testatrix, a resident of San Francisco, California, died on June 6, 1942, leaving real and personal property in the State of California and her estate is now in the course of probate in the Superior Court of the State of California in and for the City and County of San Francisco.

Under the will of the testatrix the property was left to nationals of Germany residing in Germany on the date of her death. On December 31, 1942, the defendants filed a petition in the court in which probate proceedings were pending asking the court to determine heirship. On January 23, 1943, while this petition to determine heirship was pending in the state court, the Alien Property Custodian by Vesting Order 762, vested in himself for the use of the United States all the title of alien legatees and devisees.

The appellants claim the estate as heirs at law of the decedent upon the ground that under California Probate Code, Sections 259, 259.1 and 259.2 (see Appendix, page i), that the legatees and devisees named in the will are ineligible to take and that the estate should pass by the California laws of intestate succession.

REASONS FOR DENYING THE WRIT.

1. Federal jurisdiction is purely statutory and should be strictly confined to the statutory grant.

Indianapolis v. Chase National Bank, 314 U. S. 63;

McNally v. Jackson, 7 F. (2d) 373;

Cole v. Blankenship (CCA 4), 30 F. (2d) 211.

2. Jurisdiction is given by statute to the federal courts "of all suits of a civil nature, at common law or in equity brought by the United States or by any officer thereof * * *" (28 U.S.C., Section 41 (1).)

3. However, unless a proceeding is a "suit of a civil nature at common law or in equity" it is not within the jurisdiction of the District Court.

Southern Pacific Company v. McAdoo (CCA 9), 82 F. (2d) 121.

Thus the question of jurisdiction resolves itself into a question of the nature of the proceedings involved.

4. "The rule is that doubts are to be resolved in favor of the state court" as against the federal courts when jurisdiction is questioned.

Humphrey v. U. S. Fidelity and Guaranty Co., 38 F. Supp. 224.

In this case there was pending in the state court a petition to determine heirship when the Alien Property Custodian filed his vesting order and commenced this suit. The question before the state court was whether the American heirs or the German nationals were entitled to distribution of the estate of Alvina Wagner. Inasmuch as the Alien Property Custodian

can only seize such interest as the alien has he found it necessary after filing his vesting order to ask the federal court to decide the identical question that the state court had before it, namely, whether the American heirs or the German nations were entitled to the distribution of the estate. *Until such a determination was made the Alien Property Custodian couldn't be sure that he had vested anything.*

Now the California courts have in an unbroken line of cases held that proceedings to determine heirship are not suits "of a civil nature at common law or in equity" but are special proceedings in probate administration and are proceedings *in rem*.

Estate of O'Dea, 15 Cal. (2d) 637, 104 P. (2d) 368;
Estate of Olcese, 210 Cal. 262, 291 Pac. 193;
Murray v. Superior Court, 207 Cal. 381, 278 Pac. 1033;
Estate of Ross, 180 Cal. 643, 182 Pac. 755;
Estate of Raymond, 38 Cal. App. (2d) 305, 309, 100 Pac. (2d) 1085, 1086.

It would seem clear that if this proceeding is a probate proceeding *in rem* in the state court it is likewise a probate proceeding *in rem* when brought in the federal court.

5. A federal court cannot deprive a state court of its previously acquired jurisdiction of the *res*.

United States v. Bank of New York and Trust Company, 296 U. S. 463.

"The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where the property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshall assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property."

United States v. Bank of New York and Trust Co., supra, at page 477.

This suit is not merely a suit to establish a right *in personam;* the allegations and prayer of the complaint allege ownership and seek adjudication determining the *res* to be in the Alien Property Custodian. (R. 4-5.) The California Probate Court had already assumed jurisdiction (R. 3) and the effect of this suit was to oust the state court from its jurisdiction by obtaining an adjudication of heirship and a distribution of the estate to the plaintiff.

The controlling principle involved in cases of this character was clearly set forth by the Supreme Court of the United States in *Sutton v. English,* 246 U. S. 199 at 205, where the court stated the applicable rule as follows:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem,* matters

of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make will is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a State by statute or custom, gives to parties interested the right to bring an action or suit *inter partes*, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, *but that this relates only to independent suits*, and not to procedure merely incidental or ancillary to the probate; and further that questions relating to the interests of heirs, devisees or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy." (Emphasis added.)

The court then went on to examine the state statutes involved to determine whether or not an independent suit could be brought in the state courts and finding that it could not held that it could not be brought in the federal courts even though there was diversity of citizenship and the requisite amount was in controversy.

Thus the Supreme Court in effect says that in order to be "a suit at common law or in equity" in the fed-

eral courts the case must be one which the courts of the state would take cognizance of as "a suit at common law or in equity". And the test is clearly laid down to be whether an independent suit in the state court could have been brought.

It is abundantly shown by the authorities cited *supra*, page 5, that an independent suit could not be brought in the courts of California to determine this question but that the only place to adjudicate the matter is in the probate proceedings.

6. The fact that the federal courts lack jurisdiction in this instance does not deprive the plaintiff of full opportunity to adjudicate his claim.

(a) Upon the state courts, equally with the courts of the United States, rests the obligation to guard and enforce every right secured by the Constitution and the laws of the United States whenever those rights are involved in any suit or proceedings before them.

United States v. Bank of New York and Trust Co., supra, at 479;

Robb v. Connolly, 111 U. S. 624, 637.

(b) Here it is beyond question that the Alien Property Custodian is free to invoke the jurisdiction of the state court and, if its determination of the questions presented is not acceptable to him, to have that court's decision reviewed by the federal courts.

Judicial Code, Section 237, 28 U.S.C.A. 344;

United States v. Bank of New York and Trust Co., supra, at 479.

(c) There is ample provision in the California probate proceedings, in which the property of this estate was already in the course of administration at the time this suit was filed, for determining heirship and the right of the plaintiff to receive the distributive share of the alien residents of Germany.

Estate of Ross, 180 Cal. 643.

(d) Even had the District Court set up its jurisdiction prior to appropriate proceedings being under way in the state court, there is well established authority for its relinquishing its jurisdiction in favor of the natural, orderly and adequate procedure of the state court for the administration of the property of the estate.

Pennsylvania v. Williams, 294 U. S. 176, 185;
Gordon v. Ominsky, 294 U. S. 186, 188;
United States v. Bank of New York and Trust Co., supra, at 480.

(e) While the Trading with the Enemy Act (Act of October 6, 1917; 40 Stat. 425; U. S. Code, Title 50, Appendix, Sec. 17) confers a general jurisdiction to make and enter such orders and decrees as are necessary and proper "to enforce the provision of this Act", no authorities have been cited by plaintiff, nor do we find any such to exist, stating that this provision suspends or supersedes the recognized exclusive right of state courts to probate estates where their jurisdiction has been established, as was the case in this instance.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

Dated, Richmond, California,
May 21, 1945.

JOSEPH WAHRHAFTIG,
Attorney for Respondents.

S. C. MASTERSON,
MATT WAHRHAFTIG,
Of Counsel.

(Appendix Follows.)

California Probate Code, Sections 259, 259.1, 259.2.

259. *Right of aliens to inherit: (Dependence on reciprocal rights).* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

259.1. *Burden of proof (as to reciprocal rights).* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

259.2. *When property escheats.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1945

No. 60

JAMES E. MARKHAM, Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Respondents.

BRIEF FOR RESPONDENTS.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 60

JAMES E. MARKHAM, Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Respondents.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 29) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 50) is reported in 147 F. (2d) 136.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 24, 1945. The jurisdiction of this Court is invoked by the petitioner under Section 240(a) of the *Judicial Code,* as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The question presented is whether a federal district court can assume jurisdiction in an *in rem* proceeding to determine heirship and order distribution of the estate of a decedent where the estate is in the process of probate in a state court and where an *in rem* proceeding to determine heirship is pending in said estate in the state probate court.

STATUTES INVOLVED.

The statutes involved are Section 24 (1) of the Judicial Code as amended (28 U.S.C. 41 (1)) which provides that the District Courts have jurisdiction "of all suits of a civil nature, at common law or in equity brought by the United States or by an officer thereof * * *" and upon the Act of October 6, 1917, 40 Stat. 425, 50 U.S.C., Appendix, Section 17, which provides that the District Courts have jurisdiction to make such orders and decrees as are necessary and proper "to enforce the provisions of this Act."

STATEMENT OF THE CASE.

This is an action by the Alien Property Custodian against the executor of the will of Alvina Wagner, deceased, and against the defendants who are the American heirs at law of the decedent for adjudication of the rights and interests, if any, of the Alien Property Custodian.

The testatrix, a resident of San Francisco, California, died on June 6, 1942, leaving real and personal property in the State of California and her estate is now in the course of probate in the Superior Court of the State of California in and for the City and County of San Francisco.

Under the will of the testatrix the property was left to nationals of Germany residing in Germany on the date of her death. On December 31, 1942, the defendants filed a petition in the court in which probate proceedings were pending asking the court to determine heirship. On January 23, 1943, while this petition to determine heirship was pending in the state court, the Alien Property Cutodian by Vesting Order 762, vested in himself for the use of the United States all the title of alien legatees and devisees.

The appellants claim the estate as heirs at law of the decedent upon the ground that under California Probate Code, Sections 259, 259.1 and 259.2 (see Appendix, page i), that the legatees and devisees named in the will are ineligible to take and that the estate should pass by the California laws of intestate succession.

ARGUMENT.

I.

SECTION 17 OF THE TRADING WITH THE ENEMY ACT DOES NOT CONFER JURISDICTION ON THE FEDERAL COURTS.

In support of his contention that the federal court properly assumed jurisdiction under Section 17 of the Trading With the Enemy Act the petitioner makes much in argument of what could have been done by vesting the property itself instead of vesting merely the undetermined interest of the aliens in the property. Had such action been taken by the Alien Property Custodian there is no doubt that the resident heirs would have had to follow different procedures in protecting their rights. However, we are not concerned with what might have been done or the legal effect of actions the Custodian might have taken, we are only concerned with, and must address ourselves to, what was actually done in this case. Cases such as *Central Union Trust Co. v. Garvan,* 254 U.S. 554, *Stoehr v. Wallace,* 255 U.S. 239, and *Commercial Trust Co. v. Miller,* 262 U.S. 51, cited by petitioner (Pet. Br. pp. 10, 11, 12, 14) are obviously not in point. Thus the court in *Commercial Trust Co. v. Miller;* supra, at page 53, made the following statement concerning the Trading With the Enemy Act:

> "The act has received exposition in *Central Union Trust Co. v. Garvan,* 254 U.S. 554, and *Stoehr v. Wallace,* 255 U.S. 239, and what it authorizes, and the conditions of the exercise of its authorization determined.
>
> "Whatever problems the act presents those cases resolve. They decide that the President's

power, may, under § 5 of the act, be delegated to and be exercised by the Custodian, and that the determination of the Custodian is conclusive whether right or wrong. And it may be exercised by forcible seizure of the property or by suit, and, if by suit, the suit is purely possessory and must be yielded to; the right of any claimant being postponed to subsequent assertion. And it was decided that the Custodian acquires by suit 'nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more.' In other words, and in comprehensive description, the act may be denominated an exercise of governmental power in the emergency of war and its procedure is accommodated to and made adequate to its purpose, but securing, as well, the assertion of opposing or countervailing rights 'by a suit in equity unembarrassed by the precedent executive determination', and if the claimant 'prevails' the property 'is to be forthwith returned to him'."

When the complaint in the case now before the court (R. 2-5) is read it is clear that this is not a "purely possessory" suit in which the Custodian would acquire nothing but "preliminary custody" but instead is a suit in which the court is asked to declare that the Alien Property Custodian is the owner of the property and to determine that the resident heirs are entitled to no part of the estate; it is a proceeding to determine who are the legatees under a will, in short, it is probate.

In *Application of Miller*, 288 Fed. 760, cited by the Alien Property Custodian as a case "substantially identical with this" (Pet. Br. p. 13) the court at page 766 says:

> "The legatees in the instant case therefore, had *vested interests* in the estate of Mr. Von Post and it is these *vested interests* which the Custodian is attempting to get into his possession." (Emphasis added.)

However, in this case the principal point at issue is whether the alien enemies had *any* interest for the Alien Property Custodian to vest.

In the same case, at page 767, the court in speaking of *In re Miller*, 281 Fed. 764, cited by petitioner (Pet. Br. p. 13), says:

> "We held in that case that a demand validly made by the Custodian operated at once as a seizure of the property demanded, notwithstanding the failure of the one upon whom the demand was made to comply with its terms; and we also held in that case that the subsequent proceedings in the District Court which the Custodian is compelled to bring in cases in which a demand is not complied with is not a proceeding to make a seizure but only one to enforce a seizure which was already effected by the demand."

Thus it can be seen that the cases cited bear no relation to the instant case for here the court is not asked to "enforce a seizure" which is already effected, but instead to determine what, if anything, the Custodian can seize.

In *Central Union Trust Co. v. Garvan*, 254 U.S. 554, cited by petitioner (Pet. Br. pp. 11, 14), the demand of the Custodian was for the property itself; here only the undetermined interest of the aliens was vested, and of course a judicial determination is necessary to establish what the Custodian has vested.

In *Kahn v. Garvan*, 263 Fed. 909, cited by petitioner (Pet. Br. pp. 13, 14), at page 913 the court says:

> "In the case at bar all he (Alien Property Custodian) claimed was the *acknowledged* rights of enemies * * *". (Emphasis added.)

In the present case the rights of the aliens, if any, have never been ascertained. Whether they take as legatees or whether no legacy has validly been given to them has not yet been determined. This matter is now up for determination before the probate court as a proceeding in probate. The Alien Property Custodian in this case is asking the federal court to ascertain the interest of the aliens and to order distribution of the net estate to him. (R. 4-5.) The question in this case is whether there is any property subject to seizure by the Alien Property Custodian. In order for there to be a *res* so subject there must be property of a non-resident alien. Without such there is nothing to seize or vest, and nothing upon which to predicate the district court's jurisdiction conferred in Section 17 of the Trading With the Enemy Act.

II.

JURISDICTION IS NOT CONFERRED BY JUDICIAL CODE SECTION 24(1).

In view of the clear holdings of the California courts it is difficult to understand the petitioner's insistence that this is not a matter in probate. It has been flatly held in *Estate of O'Dea,* 15 Cal. (2d) 637, 638, 104 P. (2d) 368, that

> "A proceeding to determine heirship is a matter in probate. (*In re Blythe,* 110 Cal. 226.)"

In the case there cited it is held that such a proceeding "is embraced within the scope of 'matter in probate' as clearly as is the proceeding for the sale of real property to pay the debts of an estate." (*In re Blythe,* 110 Cal. 226, 228, 42 Pac. 641.)

The probate proceedings in California being a proceeding *in rem* and the ascertainment of the rights to inherit (here the determination that "the defendants are entitled to no part of the estate" sought by the Alien Property Custodian (R. 4, 5) in the district court and obtained therefrom (R. 41, 42)) being a part of that proceeding, how can it be said that the assumption of jurisdiction by the district court, its denial of the motion of the six defendant heirs and its decree upholding the validity of the devises and legacies and adjudging the plaintiff to be entitled to receive the entire net estate, do not constitute an exercise of jurisdiction in an *in rem* proceeding, or that the judgment rendered bore no relation to the *res?*

In *Sutton v. English,* 246 U.S. 199, cited by the petitioner (Pet. Br. p. 16), it was held that a suit to

annul a will was a probate proceeding and outside the jurisdiction of a federal court. In that case it was sought to have the district court declare the provisions of a will invalid; in the case now before the court the Alien Property Custodian sought to have the district court declare (and obtained that declaration R. 41, 42) the provisions of this will to be valid. Why the federal courts should have jurisdiction to declare a will valid when they do not have jurisdiction to declare them invalid is not explained by the petitioner. Had the district court decided that the resident heirs should prevail it would have had to hold the will invalid; something which is clearly beyond its jurisdiction.

Case of Broderick's Will, 21 Wall. 503;
Ellis v. Davis, 109 U.S. 485;
Farrell v. O'Brien, 199 U.S. 89.

In *Farrell v. O'Brien*, 199 U.S. 89, at page 110 the test of jurisdiction is clearly laid down:

> "First. That, as the authority to make wills is derived from the State and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of the courts of the United States.
>
> "Second. That where a state law, statutory or customary, gives to the citizens of the State, in an action or a suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies."

The court then went on to examine the state statutes involved (Washington) and held that as the proceeding could only be had in the probate court of the state it was not within the jurisdiction of the federal court.

In *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, chiefly relied on by the petitioner (Pet. Br. pp. 16, 19, 20, 26), the court specifically mentioned and approved the rules laid down in *Farrell v. O'Brien*, supra, 215 U.S. 33, at page 44. Likewise *Sutton v. English*, 246 U.S. 199, referred to by the petitioner (Pet. Br. p. 16), cites *Farrell v. O'Brien*, supra, and follows the holding therein. Nor can anything be found in any of the cases referred to by the petitioner which militates against the clear holdings of cases cited by the Circuit Court in its opinion (R. 50, 51) or of such cases as *Farrell v. O'Brien*, or *Sutton v. English*.

An extensive citation of authority is not required to determine whether this suit is *in personam* or *in rem*. An examination of what was prayed for and what was granted will reveal the nature of the suit; the allegations and prayer of the complaint allege ownership and seek adjudication determining the *res* to be in the Alien Property Custodian. (R. 2-5.) The judgment (R. 40-42) grants the relief prayed for and decrees that the devises and legacies contained in the will are valid, that none of the resident heirs have any interest in the estate and that the Alien Property Custodian is entitled to the entire net estate.

A more complete usurpation of the probate jurisdiction of the state court would be difficult to imagine.

In truth and fact it becomes a mere ministerial agent to carry out the decrees of the federal courts.

Furthermore, the complaint shows that the property was in the process of administration in the probate court in California. The petition to determine heirship filed by the resident heirs was a part of the probate proceeding. No independent suit or suit *inter partes* could have been maintained in the California courts.

Estate of O'Dea, 15 Cal. (2d) 637, 104 P. (2d) 368;

Estate of Ross, 180 Cal. 643; 182 Pac. 755;

Whalen v. Smith, 163 Cal. 360, 125 Pac. 904;

Estate of Blythe, 110 Cal. 226, 42 Pac. 641.

The purpose of those proceedings is to administer the estate and distribute it according to the laws of California and to that end the proceeding is *in rem.*

Estate of Olcese, 210 Cal. 262, 291 Pac. 193;

Murray v. Superior Court, 207 Cal. 381, 278 Pac. 1033;

Smith v. Fidelity etc. Co., 130 Cal. App. 45, 19 P. (2d) 1018.

This suit cannot be maintained to deprive the state court of its previously acquired jurisdiction of the *res.*

United States v. Bank of New York & Trust Co., 296 U.S. 463.

It is to be noted that in each case where the federal court undertook the ascertainment of rights of inheritance or succession there existed a jurisdictional diversity of citizenship. In *United States v. Klein,* 303 U.S. 276, in which petitioner states "the applicable

doctrine was clearly outlined" (Pet. Br. p. 19), the Supreme Court qualified its opinion by the statement (at p. 281):

> "In this case jurisdiction was acquired by the District Court, *by reason of diversity of citizenship,* to adjudicate the rights of the parties." (Emphasis added.)

In *Waterman v. Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33, which petitioner classifies as "the leading case in this field" (Pet. Br. p. 20), the suit was brought in the Circuit Court of the United States for the Eastern District of Louisiana by residents and citizens of the State of Illinois against the defendant bank, a citizen of the State of Louisiana, as executor. The Supreme Court held:

> "This court has uniformly maintained the right of Federal courts of Chancery to exercise original jurisdiction (*the proper diversity of citizenship existing*) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them." (Emphasis added.)

In *Commonwealth Trust Co. v. Bradford,* 297 U.S. 613, cited by petitioner as being "of particular significance here" (Pet. Br. pp. 22, 23), no matter in probate was involved and no ascertainment of rights of inheritance was required. The federal court had the ordinary original jurisdiction of suits by receivers of national banks (Title 28, U.S.C.A., Sec. 41, (1) and (16)), and it was held that no extraordinary circumstances were disclosed by reason of which the federal

court should not retain jurisdiction and give the receiver an adjudication of his rights.

In the face of the fact that there are no decisions involving matters in probate where inheritance rights must be ascertained which recognize jurisdiction in a federal court in the absence of diversity of citizenship, petitioner cites the two following cases in support of his assertion that the fact that an officer of the United States brought the suit suffices:

Pufahl v. Estate of Parks, 299 U.S. 217;
United States v. Peoples Trust and Savings Co., 97 Fed. (2d) 771 (C.C.A. 7).

Each of these cases, however, involves the adjudicating of claims against the administrator of an estate; in neither is the determination of heirship or the ordering of distribution of the estate present. In the *Pufahl* case the executor had refused to honor the demand for payment of an assessment made by the receiver appointed by the Comptroller of the Currency, and the action was brought to establish this claim. In the *Peoples Trust and Savings Co.* case the action was brought by the United States against the executor of an estate to recover a judgment for income taxes. In neither case was the question of heirship involved,—something essentially a matter in probate. In neither case did the plaintiff seek relief such as that sought in the instant case, viz., judgment determining the resident heirs at law to be entitled to no part of the estate, determining plaintiff to be the owner of specifically described real property, and ordering the defend-

ant executor to pay the entire net estate to plaintiff. (R. 4, 5.) We submit that neither case cited is authority for petitioner's contention.

III.

THIS IS PURELY THE MATTER OF PROBATE OF A WILL.

It is the general rule that the laws in force in the place of the domicile of the testator are a part of his will.

Estate of Barnett, 97 Cal. App. 138, 275 Pac. 453;

Estate of Barton, 196 Cal. 508, 238 Pac. 681;

In re Bergdorf's Will, 206 N.Y. 309, 99 N.E. 714.

As stated by the court in *Estate of Barnett*, supra:

> "Thus, when the legislature has prescribed the rules and conditions under which the disposition and administration of estates may be had, the testator is deemed to intend the result which such rules produce and 'they affect the testamentary dispositions and provisions as though embodied in the will.'"

Here the decedent made her will December 23, 1941. California Probate Code Sections 259, 259.1 and 259.2 had become effective on July 1, 1941. Under the law these sections were a part of her will. The decedent died June 6, 1942. It is fair to presume that during this period she had become aware of the Probate Code sections involved, in other words, she had become

aware of the fact that the law of the state nullified her gift to the alien enemies. Yet she did not change her will but was satisfied to let the probate section control it. Therefore, at the date of her death, when the will first spoke,—being an ambulatory instrument,—she knew she had disposed of property as the law had directed its disposition. It was as if on June 5, 1942, she had added a codicil to her will stating that because she was unable to make a gift to aliens residing in Germany, she therefore revoked that provision in her will which purported to make such a gift, and in lieu thereof made a gift to her resident heirs. Had she done so, would there have been any question of the validity of such disposition? Where would there have been any federal question? Would the Alien Property Custodian then have contested for a vesting of rights under the prior will? A construction of the words of the will, and of the local law applicable thereto, vests the gift in the local heirs *by the act* of the testatrix. The determination of this question is a matter of probate administration.

The decision of the California court holding that Sections 259, 259.1 and 259.2 of the California Probate Code are constitutional fully support the views which we have expressed in this brief. We refer, of course, to *Estate of Bevilacqua* (August 21, 1945), 70 Advance California Appellate Reports, page 681, 161 P. (2d) 589, and *Estate of Knutzen,* 161 P. (2d) 593. The court again expresses the well established law that the state which confers a right of inheritance or the right to leave property by will may abolish it at any time or

impose conditions on its existence. As stated above, because of the death of the decedent after the effective date of the above probate sections it must be assumed that she, prior to her death, had become aware of the probate code sections involved, and it is therefore as if she in express words desired the law to become a part of her will. That law entering into and becoming a part of her will gave her property to the California heirs and not to the aliens. Again a pure question of probate is involved, and the question is not what interest did the alien take under her will, but rather who was a legatee under her will. A pure question of probate administration in which no federal question is involved.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be sustained.

Dated, Richmond, California,
November 2, 1945.

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(Appendix Follows.)

California Probate Code, Sections 259, 259.1, 259.2.

259. *Right of aliens to inherit: (Dependence on reciprocal rights).* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

259.1. *Burden of proof (as to reciprocal rights).* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

259.2. *When property escheats.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

SUPREME COURT OF THE UNITED STATES.

No. 60.—October Term, 1945.

James E. Markham, Alien Property Custodian, Petitioner, *vs.* Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 7, 1946.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question is whether a district court of the United States has jurisdiction of a suit brought by the Alien Property Custodian against an executor and resident heirs to determine the Custodian's asserted right to share in decedent's estate which is in course of probate administration in a state court.

On January 23, 1943, petitioner, the Alien Property Custodian, acting under § 5(b)(1)(B) of the Trading with the Enemy Act, 55 Stat. 839, 50 U. S. C. App., Supp. IV, § 616, and Executive Order No. 9095, as amended by Executive Order 9193, 3 Code Fed. Reg. (Cum. Supp.) 1121, issued vesting order No. 762, by which he purported to vest in himself as Custodian all right, title and interest of German legatees in the estate of Alvina Wagner, who died testate, a resident of California, whose will was admitted to probate and whose estate is being administered in the Superior Court of California. Previously, on December 30, 1942, six of the other heirs-at-law of decedent, residing in the United States, filed a petition in the Superior Court of California for determination of heirship, asserting that under the provisions of California Statutes, 1941, chap. 895, § 1,* the German legatees were ineligible as beneficiaries, and that the American heirs were therefore entitled to inherit decedent's estate. This proceeding is still pending.

On April 6, 1943, the Custodian brought the present suit in the district court for the northern district of California against the executor and the six California claimants, seeking a judgment determining that the resident claimants have no interest in the

* This statute purports to limit inheritance by non-resident aliens to nationals of countries which grant reciprocal rights of inheritance to American citizens.

estate, and that the Custodian, by virtue of his vesting order, is entitled to the entire net estate of the decedent after payment of expenses of administration, debts, and taxes, and is the owner of specified real estate of decedent passing under the will. The complaint prayed that the executor be ordered to pay the entire net estate to the Custodian upon the allowance by the state court of the executor's final account. On motion of respondents to strike the complaint, and on petitioner's motion for judgment on the pleadings, the district court gave judgment for petitioner, 52 F. Supp. 850. The court held that it had jurisdiction to enforce the vesting order of petitioner; that its jurisdiction is derived from the Constitution and laws of the United States and is not subject to restriction or ouster by state legislation; and that California Statutes, 1941, chap. 895, § 1, is invalid. The judgment declared that petitioner had acquired the interests of the German nationals in the estate of decedent; that none of respondents have any right, title or interest in the estate; and that petitioner is entitled to receive the net estate in distribution after payment of expenses of administration, debts and taxes.

Without passing upon the merits, the Court of Appeals for the Ninth Circuit reversed and ordered the cause dismissed, upon the ground that the district court was without jurisdiction of the subject matter of the action. 147 F. 2d 136. The court thought that since "the matter is within probate jurisdiction and that court is in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court."

It is not denied that the present suit is a suit "of a civil nature . . . in equity," brought by an officer of the United States, authorized to sue, of which district courts are given jurisdiction by §24(1), 28 U. S. C. § 41(1), of the Judicial Code. But respondents argue, as the Circuit Court of Appeals held, that as the district courts of the United States are without jurisdiction over probate matters, see *Broderick's Will*, 21 Wall. 503, 517; *Byers* v. *McAuley*, 149 U. S. 608, 615, which the court of appeals thought are not "cases or controversies within the meaning of Article III of the Constitution," and since the present suit to determine heirship of property being administered in a state probate court is an exercise of probate jurisdiction, the district court is without jurisdiction.

It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity juris-

diction conferred by the Judiciary Act of 1789 and § 24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters. *Kerrich* v. *Bransby*, 7 Brown P. C. 437; *Barnesley* v. *Powel*, 1 Vest. Sen. 284; *Allen* v. *Macpherson*, 1 Phillips, 133; 1 House of Lords Cases, 191; *Broderick's Will*, *supra*; *Farrell* v. *O'Brien*, 199 U. S. 89; *Sutton* v. *English*, 246 U. S. 199, 205. But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43, and cases cited. See *Sutton* v. *English*, *supra*, 205; *United States* v. *Bank of New York Co.*, 296 U. S. 463, 477; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 619; *United States* v. *Klein*, 303 U. S. 276; *Princess Lida* v. *Thompson*, 305 U. S. 456, 466.

Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, *Penn Co.* v. *Pennsylvania*, 294 U. S. 189, 195-196 and cases cited; *United States* v. *Bank of New York Co.*, *supra*, 477-478 and cases cited, it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. *Commonwealth Trust Co.* v. *Bradford*, *supra*, 619; *United States* v. *Klein*, *supra*, 281 and cases cited.

Although in this case petitioner sought a judgment in the district court ordering defendant executor to pay over the entire net estate to the petitioner upon an allowance of the executor's final account, the judgment declared only that petitioner "is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes." The effect of the judgment was to leave undisturbed the orderly administration of decedent's estate in the state probate court and to decree petitioner's right in the property to be distributed after its administration. This, as our authorities demonstrate, is not

an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court.

There remains the question whether the district court, having jurisdiction should, in the exercise of its discretion, have declined to entertain the suit which involves issues of state law and have remitted the petitioner to his remedy in the state probate proceeding. See *Thompson* v. *Magnolia Co.*, 309 U. S. 478, 483; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; compare *Pennsylvania* v. *Williams*, 294 U. S. 176, 182-186; *Gordon* v. *Ominsky*, 294 U. S. 186; *Gordon* v. *Washington*, 295 U. S. 30, 39; *United States* v. *Bank of New York Co.*, *supra*, 480. The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner. *Meredith* v. *Winter Haven*, 320 U. S. 228. This is the more so in this case because § 17 of the Trading with the Enemy Act, 50 U. S. C. App. § 17, specially confers on the district court, independently of the statutes governing generally jurisdiction of federal courts, jurisdiction to enter "all such orders and decrees . . . as may be necessary and proper in the premises to enforce the provisions" of the Act. Although the district court has jurisdiction of the present case under § 24(1) of the Judicial Code, irrespective of § 17, the latter section plainly indicates that Congress has adopted the policy of permitting the custodian to proceed in the district courts to enforce his rights under the Act, whether they depend on state or federal law. The cause was therefore within the jurisdiction of the district court, which could appropriately proceed with the case, and the Court of Appeals erroneously ordered its dismissal.

The judgment is reversed and the cause remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice RUTLEDGE is of the opinion that the cause should be remanded to the district court and jurisdiction should be retained by it pending the state court's decision as to the persons entitled to receive the net estate.